

# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ERNIE HINES D/B/A COLORFUL MUSIC,

Plaintiff,

v.

BMG RIGHTS MANAGEMENT (US) LLC,  
W CHAPPELL MUSIC CORP., SHAWN  
CARTER p/k/a JAY-Z, TIMOTHY MOSLEY  
p/k/a TIMBALAND, and ELGIN BAYLOR  
LUMPKIN p/k/a GINUWINE,

Defendants.

CASE NO. 1:20-CV-03535-JPO

**EXPERT MUSICOLOGY REPORT OF DR. LAWRENCE FERRARA; AND  
REBUTTAL TO THE REPORT OF DR. JOE BENNETT**

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(BY) LAWRENCE FERRARA, Ph.D.  
(FOR) LAWRENCE FERRARA, INC.

REPORT REGARDING

HINES V. MOSLEY *ET AL.*

I. INTRODUCTION AND SUMMARY

1. I am a musicologist on the full-time faculty at New York University where my rank is Professor of Music, and my title is Director Emeritus of all studies (B.M. through Ph.D.) in Music and the Performing Arts in NYU's Steinhardt School. I have written and co-written published books and articles (in peer reviewed journals) regarding music analysis, methodologies in music research, and other scholarly areas related to music. I currently sit on editorial boards of peer-reviewed scholarly journals in music published by Indiana University Press and University of Illinois Press. I have been an active music copyright consultant for record, music publishing, motion picture companies, artists and other individuals in the United States and abroad for more than 25 years. I have given invited lectures on music copyright at Harvard University Law School in each of the last twelve years, and presentations at Columbia University Law School over the last fifteen years. I have also presented several peer-reviewed papers regarding music copyright at meetings of the American Musicological Society GNY, and panel presentations for numerous organizations such as The Copyright Society of the United States. My *curriculum vitae* is attached as **Appendix 1**.

2. I have been asked to complete a comparative musicological analysis of the compositions in Plaintiff's "Help Me Put Out the Flame (In My Heart)" (hereafter "FLAME") as written and recorded by Ernie Hines, Defendants' "Paper Chase" as recorded by Jay-Z featuring Foxy Brown (hereafter "PAPER"), and Defendants' "Toe 2 Toe", as recorded by Ginuwine (hereafter "TOE"). It is my understanding that FLAME was released in 1970, PAPER was released in 1998, and TOE was released in 1999.

3. My report provides a comparative musicological analysis of the compositions in (1) FLAME and PAPER and (2) FLAME and TOE and assesses (a) the

significance or lack thereof of any shared similarities in such compositions and (b) whether or not any shared similarities in such compositions exist in “prior art”, i.e., musical compositions that predate 1970, the year in which FLAME was released.<sup>1</sup>

4. I was also asked to review and respond to a report by Dr. Joe Bennett dated September 8, 2019 (hereafter “the Bennett Report”).

#### **I. A. SUMMARY OF FINDINGS**

5. On the basis of my musicological analysis, which is described below, it is my professional opinion that there are no significant structural, harmonic, rhythmic, melodic, or lyrical similarities, individually or in the aggregate, between FLAME and PAPER or between FLAME and TOE. Because it is consistent with my musicological practice, that conclusion is based on my comparative analyses (discussed below) of the entireties of the compositional works at issue, however in this instance the only material from FLAME that is alleged to be copied is a short, introductory section that is a minimal part of FLAME.

6. The only musical material at issue in FLAME is a melody that appears only briefly and only once in the 5-second Intro (Introduction) of FLAME, which the Bennett Report calls a three bar guitar riff. That melody does not repeat in any other part of FLAME, and has no connection to any other melodies found elsewhere in FLAME. The 5-second Intro is a minimal part of FLAME, 5 seconds in duration out of a total of 3:12 (3 minutes and 12 seconds) or 192 seconds in duration. The melody in the 5-second Intro does not appear on the lead sheet deposit copy of FLAME submitted for

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<sup>1</sup> I understand that Plaintiff asserts that PAPER and TOE sampled from a sound recording of FLAME. I have been advised that Defendants do not concede same, and have been further advised that Plaintiff does not own any copyright in the sound recording of FLAME. I have been asked to assume sampling of the sound recording, and assess the musicological significance, if any, of similarities between the musical compositional elements between FLAME and PAPER and FLAME and TOE. A musicological analysis assessing similarities between sound recordings is not the same as a musicological analysis assessing similarities between musical compositions.

copyright registration and registered in 1969. In addition to being quantitatively insignificant, the 5-second Intro is qualitatively insignificant to FLAME as a whole.

7. Most significantly, the 5-second Intro at issue in FLAME is based on the exceedingly well-known “Mysterioso Pizzicato” melody which is in the public domain and used in many musical compositions in multiple genres (including in film music and popular songs) that predate 1970. As such, the use of this melody in FLAME is merely an instance of the use of a stock device.

8. The similarities between FLAME and PAPER, and FLAME and TOE, all based on the claimed copying of the 5-second Intro, are the same similarities that are found in the public domain material discussed above, based on “Mysterioso Pizzicato”, and predate FLAME. The thin and fragmentary similarities in PAPER and TOE as compared with FLAME do not copy any significant expression from FLAME but rather use the same public domain material that Plaintiff copied from “Mysterioso Pizzicato”. The only additional material that Plaintiff has supplied in the 5-second Intro that is not found in “Mysterioso Pizzicato” and other public domain sources based thereon is one additional “C” note, which additional note does not even appear in either PAPER or TOE.

9. The Bennett Report presents a flawed analysis of the musical compositions’ similarities, while focusing on the sound recording analysis that is not relevant to the musical compositions’ analysis here. While the Bennett Report finds that the guitar melodies in PAPER and TOE are “compositionally copied” from FLAME, the 5-second Intro in FLAME is, as the Bennett Report concedes, copied from the “Mysterioso Pizzicato” public domain melody. The Bennett Report’s finding on this issue contradicts and undermines his finding of “compositional copying” and also his contention that the 5-second Intro is an “original composition”. First, it is my understanding that expert musicologists are not permitted to opine on the ultimate issues of whether a work or an element within a work qualifies as “an original element” or “an original composition”. However, solely for purposes of responding to this conclusion offered in the Bennett Report and from a musicological perspective, based

on my analyses set forth below, it is my opinion that there is no musicological support for a claim that the 5-second Intro in FLAME embodies any “original element”. An abundance of musicological evidence supports this conclusion as set forth below.

10. At bottom, the Bennett Report fails to show that the 5-second Intro constitutes “original” expression in FLAME which was copied in PAPER and/or TOE – instead, the Bennett Report’s acknowledgement of the source of the 5-second Intro in Flame compels the opposite conclusion.

### **I. B. Materials Used**

11. The following materials were used in my analyses of FLAME and PAPER and of FLAME and Toe set forth below:

- (a) an mp3 audio of FLAME titled “Help Me Put Out the Flame (In My Heart)” from the album *The Complete Stax / Volt Soul Singles, Vol. 2: 1968-1971* that I downloaded from iTunes and attached as Track 1 on **Audio Exhibit 1**;
- (b) an mp3 audio of PAPER titled “Paper Chase” from the album *JAY Z – Vol. 2... Hard Knock Life* that I downloaded from iTunes and attached as Track 2 on **Audio Exhibit 1**;
- (c) an mp3 audio of TOE titled “Toe 2 Toe” from the album *Ginuwine – 100% Ginuwine* that I downloaded from iTunes and attached as Track 3 on **Audio Exhibit 1**;
- (d) musical compositions that embody similarities at issue that are listed in **Visual Exhibit A** with YouTube links;
- (e) the original 1969 2-page sheet music deposit copy of FLAME attached as **Visual Exhibit B**;
- (f) plaintiff’s Third Amended Complaint filed 02/24/2022; and



(g) the report of Dr. Joe Bennett dated September 8, 2019.

### **I. C. OVERALL METHODOLOGY**

12. I compared FLAME to PAPER and FLAME to TOE by using the following overall methodology:

- (a) analyses of FLAME and PAPER and of FLAME and TOE in their entirety,
- (b) analyses of each of their component elements individually and in combination,
- (c) analyses of prior art, and
- (d) analyses of FLAME and PAPER and of FLAME and TOE in their entirety within the context of the analysis of their component parts and prior art.

### **I. D. MUSICAL COMPOSITIONS AND BASIC TERMINOLOGY**

13. A musical composition is composed of certain distinct and identifiable elements that can be analyzed separately, and in combination. When analyzing two compositions in order to form an opinion in music copyright infringement claims, some elements are more fundamental to determining similarities or differences than others, namely: (1) structure; (2) harmony; (3) rhythm; and (4) melody; and, when present (5) lyrics.<sup>2</sup> On the other hand, similarities or differences in the key (e.g., if two compositions are in the same key or in different keys), tempo (i.e., how fast or slow), meter (e.g., 4/4 time), instrumentation (e.g., the use of guitars, drums, synthesizers, etc.), and style or genre (e.g., hip hop, country, etc.) are less significant insofar as they represent musical building blocks and/or commonplace practices used in countless musical compositions. Brief definitions of the five enumerated elements listed above follow.

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<sup>2</sup> For example, Ronald S. Rosen writes: “Thus, from the copyright perspective (and in the view of many musical professionals) ...the basic elements of music are: melody, harmony, rhythm, and form/structure.” (Ronald S. Rosen, *Music and Copyright*, Oxford University Press, 2008, p. 156) In addition and as cited in Rosen (footnote 19 on page 156): “In *Tisi v. Patrick*, both experts were in agreement ‘that the elements to be considered on the question of similarity between [the two songs] were structure, melody, harmony and rhythm.’ 97 F.Supp.2d 539,543 (S.D.N.Y.2000).”

(a) **Structure** is the organization of musical units or musical groups, often dictated by the development of the melody and/or lyrics. The larger sections of songs are generally referred to as “Verses” and “Choruses”. The material within Verses and Choruses consists of “phrases”.

(b) **Harmony** refers to the tonal relationship of pitches that sound simultaneously, especially (but not exclusively) with respect to the use and organization of “chords.”<sup>3</sup> A sequence of chords is referred to as a “harmonic progression”. “Harmonic rhythm” is the rate of change of chords.<sup>4</sup>

(c) **Rhythm** refers to the pattern and organization of the time values of sounds and silences as well as the overall rhythmic flow and feel in musical time.<sup>5</sup>

(d) **Melody** is a single line of music that consists primarily of a succession (i.e., a sequence or order) of pitches and the rhythmic durations of those pitches within a melodic phrase structure. “Pitch” is the specific high or low placement of a musical sound, often identified within a musical scale.<sup>6</sup>

(e) **Lyrics** are the words (or text) that are sung or spoken in a song.

## **II. ANALYSIS OF FLAME AND PAPER**

14. As discussed above, pursuant to my musicological practice, in this section I analyze FLAME and PAPER from the perspective of their entireties, along with my comparative analysis of the only material at issue in FLAME (the 5-second Intro) and PAPER.

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<sup>3</sup> See “Harmony” in *The Harvard Dictionary of Music* (Fourth Edition, 2003, Harvard University Press, p. 379) and *The New Grove Dictionary of Music and Musicians* (Oxford University Press, Second Edition, 2001, Vol. 10, p. 858).

<sup>4</sup> See “Harmonic rhythm” in *Harvard* (p. 376) and *Grove* (Vol. 10, p. 854).

<sup>5</sup> See “Rhythm” in *Harvard* (p. 723) and *Grove* (Vol. 21, p. 277).

<sup>6</sup> See “Melody” in *Harvard* (p. 499) and *Grove* (Vol. 16, p. 363).

## **II. A. STRUCTURE/FORM**

### **The Overall Structures in FLAME and PAPER Are Significantly Different**

15. A structural chart provides a map of the structural sections in a musical composition. The comparative chart of the respective structures in FLAME and PAPER presented immediately below include the starting time of each section (within 1 second), the name of each structural section, and the number of full bars<sup>7</sup> in each structural section.

<b>FLAME</b>			<b>PAPER</b>		
STRUCTURAL CHART			STRUCTURAL CHART		
00:00	Intro	3 bars	00:00	Intro	8 bars
00:05	Verse 1	8 bars	00:21	Verse 1	16 bars
00:24	Pre-chorus 1	4 bars	01:04	Chorus 1	8 bars
00:33	Chorus 1	7 bars	01:25	Verse 2	16 bars
00:47	Verse 2	8 bars	02:08	Chorus 2	8 bars
01:06	Pre-chorus 2	4 bars	02:29	Verse 3	16 bars
01:15	Chorus 2	7 bars	03:12	Chorus 3	8 bars
01:30	Bridge	13 bars	03:33	Outro	23 bars
01:58	Verse 3	8 bars	(ends at 4:35 including fade)		
02:16	Pre-chorus 3	4 bars			
02:25	Chorus 3	8 bars			
02:43	Outro	13 bars			
	(ends at 3:12 including fade)				

16. As demonstrated in the comparative chart above, FLAME and PAPER incorporate generic structural building blocks in music through the use of Intro, Verse,

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<sup>7</sup> A “bar” (or “measure”) is a unit of musical time demarcated by vertical lines termed “bar lines.” In 4/4 meter, a bar consists of four beats, each with the value of a quarter note. See “Measure” in *Harvard* (p. 496) and “Bar” in *Grove* (Vol. 2, p. 681).

Chorus, and Outro sections. However, the length of these sections is different in each song, with the exception of Chorus 3, which is 8 bars in both.

17. By way of additional difference, while FLAME has three Pre-chorus sections respectively between each Verse and Chorus, PAPER does not include any Pre-chorus sections. Moreover, while FLAME has a Bridge, PAPER does not.

18. As analyzed below, the only portion that is at issue in FLAME is the 5-second Intro out of a total of 3:12 (3 minutes and 12 seconds) or 192 seconds in duration. The expression at issue in FLAME never returns after this brief Intro section.

19. As respectively heard on Tracks 1 and 2 of **Audio Exhibit 1**, while the guitar plays alone in the Intro (preceding any vocal part) in FLAME, in PAPER the guitar, drums, and vocal rap are all present in the Intro.

20. In summary, I found that there are no significant structural similarities between the two songs, but there are significant structural differences. Any structural similarities are generic.

## **II. B. HARMONY**

### **The Chord Progressions in FLAME and PAPER Are Significantly Different**

21. Both FLAME and PAPER are in the key of G minor, a commonplace key in popular music. The key of G minor is a fundamental musical building block.

22. Musicologists often use Roman numerals to identify chords in musical compositions. A chord can be built on each scale degree, 1-7, and identified with Roman numerals. By way of example, in a major key:

- A “**I**” chord is a major chord built on scale degree 1;
- A “**IV**” chord is a major chord built on scale degree 4; and
- A “**V**” chord is a major chord built on scale degree 5.

23. FLAME has several chord progressions. Musical Examples 1-4 below chart the chord progressions in Verse 1, Pre-chorus 1, Chorus 1, and the Bridge of FLAME.

**MUSICAL EXAMPLE 1**

**The Chord Progression in Verse 1 of FLAME**

At 0:07

5

i7 i

IV9 V7 i

**MUSICAL EXAMPLE 2**

**The Chord Progression in Pre-chorus 1 of FLAME**

At 0:25

V IV6 bIII IV6 V

**MUSICAL EXAMPLE 3****The Chord Progression in Chorus 1 of FLAME**

At 0:33

Chord progression for Musical Example 3 (Chorus 1 of FLAME):

- Measure 1:  $\flat\text{III}$
- Measure 2:  $i$
- Measure 3:  $V7$
- Measure 4:  $i$
- Measure 5:  $IV9$
- Measure 6:  $i$
- Measure 7:  $\flat\text{VII}7$

**MUSICAL EXAMPLE 4****The Chord Progression in the Bridge of FLAME**

At 1:31

Chord progression for Musical Example 4 (Bridge of FLAME):

- Measure 1:  $i$
- Measure 2:  $IV9$
- Measure 3:  $i$
- Measure 4:  $IV9$
- Measure 5:  $i$
- Measure 6:  $IV9$
- Measure 7:  $i$
- Measure 8:  $\flat\text{III}$
- Measure 9:  $IV6\ V$
- Measure 10:  $\flat\text{III}$
- Measure 11:  $i$
- Measure 12:  $\flat\text{VII}7$
- Measure 13: (unlabeled)

24. Musical Example 5 below charts the 8-bar chord progression used throughout PAPER.<sup>8</sup>

<sup>8</sup> The final  $\text{vii}$  chord in bar 8 of the PAPER chord progression (see Musical Example 5) occurs simultaneously with an anticipated  $i$  chord in the guitar part, creating

**MUSICAL EXAMPLE 5**  
**The Chord Progression in PAPER**

At 0:00

The musical notation is in G minor, 4/4 time. The first staff contains measures 1 through 4, and the second staff contains measures 5 through 8. Chord symbols are placed above the staves: i (measures 1, 5), iv7 (measures 2, 6), i (measures 3, 7), and vi bVII VII (measures 4, 8). Measure 6 also includes an i7 chord symbol. The notation uses a treble clef and a key signature of two flats (Bb and Eb).

25. As transcribed above, the basic chord progressions (without added tones such as 6, 7, and 9) in FLAME are as follows:

<b>i-IV-V-i</b>	(in the Verse)
<b>V-IV-bIII-IV-V</b> <sup>9</sup>	(in the Pre-chorus)
<b>bIII-i-V-i-IV-i-bVII</b>	(in the Chorus)
<b>i-IV-i-IV-i-IV-i-bIII-IV-V-bIII-i-bVII</b>	(in the Bridge)

a harmonic dissonance. Since this chord is not directly relevant to the comparative harmonic analysis with FLAME, I have opted to identify the basic “**vii**” chord symbol in bar 8 instead of the dissonant chord created by the brief anticipated guitar chord, which would be listed as “**i(maj9#11)/7**”. Related and by way of example, the notes in the horns in the Chorus of PAPER also alter some chords albeit slightly, but the basic chord progression remains the same.

<sup>9</sup> A lower case “b” placed in front of a Roman numeral denotes that the chord is “flatted” or “lowered” by a half step from its “raised” note. Thus, a “bVII” chord is a major chord built on a lowered (by a half step) seventh scale degree. In the key of G minor, F-sharp (F#) is the raised seventh scale degree and F-natural is the lowered seventh scale degree.

26. By way of significant difference, the basic harmony (without added 7s) in PAPER consists of the following four-bar chord progression.

**i–iv7–i–vi–bvii–vii** (throughout)

28. The only remotely similar harmonic movement is from **i** to **IV** in the Verse, Chorus, and Bridge of FLAME as compared to the **i** to **iv7** movement in PAPER. However, a major **IV** chord (in FLAME) is not the same as a minor **iv7** chord (in PAPER), and harmonic movement in both **i–iv** and **i–IV** pairs of chords has been commonplace in Western music for centuries. Moreover, this generic 2-chord movement is within a harmonic context of very different chord progressions in FLAME and PAPER as shown above.

29. In addition, the harmonic rhythm (i.e., the rate of change of the chords) is different in FLAME and PAPER. For example, the harmonic rhythm in PAPER includes rapid changes from **vi** to **bvii** to **vii**, as shown in bar 8 of Musical Example 5 above, which does not occur in FLAME.

30. In summary, I found that there are no significant harmonic similarities between the two songs, but there are significant harmonic differences. Moreover, when combined with my findings regarding structure (above), I found that there are no significant structural and/or harmonic similarities, individually or in the aggregate, between FLAME and PAPER and that any similarities are generic.

## **II. C. RHYTHM**

### **The Overall Rhythmic Flow and Feel in FLAME and PAPER Are Significantly Different**

31. FLAME and PAPER are in 4/4 meter, also known as “common time”. As noted in footnote 7 above, in 4/4 meter, a bar consists of four beats, each with the value of a “quarter note”. 4/4 meter has been a musical building block for centuries.



32. The tempo (i.e., the performance speed) in the first three seconds of FLAME is about 171 BPM (i.e., beats per minute). Ending with a tremolo<sup>10</sup> guitar chord just after the three-second mark, in the entrance of the vocal melody (which occurs by 0:05), the tempo slows down drastically, staying at an average tempo of about 110 BPM, with slight variations, for the remainder of the song. Thus, the tempo of the Intro of FLAME is very different from the tempo in the remainder of FLAME. The tempo in PAPER is fixed throughout at a slower tempo of approximately 90 BPM.

33. The overall rhythmic flow and feel are significantly different in FLAME and PAPER and specifically, the guitar rhythms, bass guitar rhythms, and drum rhythms are mostly different in FLAME and PAPER. There are no significant rhythmic similarities in the overall rhythmic flow and feel in FLAME and PAPER.

34. In summary, I found that there are no significant rhythmic similarities between the two songs, but there are significant rhythmic differences. Moreover, when combined with my findings regarding structure and harmony, I found that there are no significant structural, harmonic, and/or rhythmic similarities, individually or in the aggregate, between FLAME and PAPER, and that any similarities are generic and/or thin and fragmentary.

## **II. D. MELODY**

### **The Melodic Similarity Between the Intro of FLAME and PAPER Is Thin and Fragmentary and the Melodies in the Remainder of FLAME Are Significantly Different From Any Melodies in PAPER**

35. The 5-second Intro in FLAME consists wholly of playing on a guitar. All of the guitar music at issue in the 5-second Intro of FLAME is transcribed in Musical Example 6 below. As discussed above in the section on Structure, the only portion at issue in FLAME is in the 5-second Intro. Therein, the guitar melody is approximately 3 seconds in duration followed by the tremolo guitar chord which enters at approximately

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<sup>10</sup> A “tremolo” is a “rapid reiteration of a single note or chord....” (*Grove*, Volume 25, p. 716.)

3 seconds and lasts for approximately 2 seconds. As noted above, the expression in the 5-second Intro never returns in FLAME, has no meaningful similarity to the rest of FLAME, and represents a minimal part of FLAME.

**MUSICAL EXAMPLE 6**  
**The 5-Second Intro in FLAME**

At 0:00



36. As transcribed in Musical Example 6 above, the 5-second Intro consists of a brief solo guitar melody followed by a sustained tremolo guitar chord. The vocal melody enters by 0:05 in FLAME, is not similar to PAPER, and is not at issue. Looking at Musical Example 6 above, the first five notes of the guitar part are a “pickup”<sup>11</sup> to the first full bar in Musical Example 6. The “G” at the end of the descending scale is clearly on the downbeat (beat 1) in bar 2. The strength of the “G” as a downbeat in bar 2 reinforces the pickup status and metric placements of the first five notes in the guitar part at issue in FLAME.

37. The expression at issue in PAPER is a fragmentary part of an eight-bar guitar figure shown below in Musical Example 7.

<sup>11</sup> A “pickup” consists of “One or more notes preceding the first metrically strong beat (usually the first beat of the first complete measure)....” (*Harvard*, p. 660.)

**MUSICAL EXAMPLE 7**  
**The Guitar Parts in PAPER**

At 0:00

The musical notation shows two guitar parts, Gtr. 1 and Gtr. 2, in 4/4 time with a key signature of one flat (B-flat). The notation is divided into eight measures, numbered 1 through 8. Gtr. 1 contains the main melody, and Gtr. 2 provides accompaniment. The notation includes various musical symbols such as notes, rests, and bar lines.

38. The guitar parts in PAPER transcribed immediately above are “looped” (repeated). The main or “Guitar 1” part is panned to the center of the stereo mix and contains the melody. The “Guitar 2” part is panned to the left and “accompanies” the Guitar 1 melody. The Guitar 1 part, which contains the melodic elements at issue, consists of four 2-bar melodic phrases: bars 1-2, bars 3-4, bars 5-6, and bars 7-8. Each 2-bar phrase starts with iterations of the note “G” (scale degree 1 in the key of G minor). There are no pickup notes in any of these 2-bar melodic phrases. The first chord occurs on beat 3& of bar 5 in the middle of the phrase embodied in bars 5-6. The second chord occurs on beat 4& of bar 8.

39. Musical Example 8 below is a comparative transcription of the entire 5-second Intro in FLAME (on the top staff) and bars 1-4 of the 8-bar Guitar 1 melody in PAPER (on the bottom staff). Scale degree numbers have been added above the notes on the top staff and below the notes on the bottom staff in Arabic numerals. The Roman numeral “i” indicates a minor i chord (a G minor chord in the key of G minor). A minor i chord in a minor key is a fundamental musical building. Musical Example 9,

directly following Musical Example 8, is a similar comparative transcription of the entire 5-second Intro in FLAME (on the top staff) and bars 4-8 of the 8-bar Guitar 1 loop in PAPER (on the bottom staff).

### MUSICAL EXAMPLE 8

**5-Second Intro in FLAME (pickup and bars 1-3) and  
Guitar 1 in PAPER (bars 1-4)**

Musical Example 8 shows a comparative transcription of the 5-second Intro in FLAME (top staff) and Guitar 1 in PAPER (bottom staff, bars 1-4). Both are in 4/4 time. The FLAME staff starts at 0:00 and features a melody with scale degrees 1 3 4 5 1, 6 5 4 3 2 1, and a final chord marked 'i'. The PAPER staff also starts at 0:00 and features a melody with scale degrees 1 1 1, 5 1 5 1 6 5 4 1 1 1, and 5 1 6 5 4. The bottom staff ends with a final chord marked 'i'.

### MUSICAL EXAMPLE 9

**5-Second Intro in FLAME (pickup and bars 1-3) and  
Guitar 1 in PAPER (bars 5-8)**

Musical Example 9 shows a comparative transcription of the 5-second Intro in FLAME (top staff) and Guitar 1 in PAPER (bottom staff, bars 5-8). Both are in 4/4 time. The FLAME staff starts at 0:00 and features a melody with scale degrees 1 3 4 5 1, 6 5 4 3 2 1, and a final chord marked 'i'. The PAPER staff starts at 0:11 and features a melody with scale degrees 1 1 1 1, 'i', 5 1 6 5 4 1 1 1, 5 1 5 1 6, and a final chord marked 'i'. The bottom staff ends with a final chord marked 'i'.

40. As shown in Musical Examples 8 and 9 above, the guitar melody and chord in each song are charted as scale degrees as follows.

FLAME Intro	1 3 4 5 1	6 5 4 3 2	1	i
PAPER bars 1-4	1 1 1	5 1 5 1 6 5 4	1 1 1	5 1 6 5 4
PAPER bars 5-8	1 1 1 1 i	5 1 6 5 4	1 1 1	5 1 5 1 6 i

41. As charted and transcribed above, the similarities between the entire 5-second Intro in FLAME and the 8-bar Guitar 1 melody in PAPER are as follows.

- Both start on scale degree 1.
- Both contain the melodic sequence 5-1-6-5-4.
- Both play scale degree 6 off the beat.
- Both end with a strummed i chord.

42. The differences between the entire 5-second Intro in FLAME and the 8-bar Guitar 1 melody in PAPER are as follows.

- FLAME contains scale degrees 2 and 3 while PAPER does not.
- PAPER contains consecutive iterations of scale degree 1, while FLAME contains no consecutive iterations of scale degree 1 or any other note.
- The melodic phrase structure in FLAME is a pickup (of 5 notes) followed by 2 bars of melody and a sustained chord, while in PAPER the melodic phrase structure is four 2-bar phrases without any pickup notes.
- The chord in FLAME occurs after the guitar melody, while there is a chord in PAPER that occurs on beat 3& of bar 5, which is in the middle (not at the end) of the 2-bar melodic phrase in bars 5-6 and in the middle of the 8-bar guitar loop.

- The eight-bar melody in PAPER contains 35 notes and 2 strummed chords, while the FLAME melody contains 11 notes and 1 strummed chord.
- Other than the generic building block of some consecutive eighth notes (set to different corresponding pitches in FLAME and PAPER), there are no notable similarities between the melodic rhythms in FLAME and PAPER.

43. Thus, while the melodic similarity includes a sequence of five pitches on scale degrees 5-1-6-5-4, those five pitches are set to (a) different rhythmic durations and (b) different metric placements (within beats). **As my analysis below of prior art shows, this 5-pitch fragment was commonplace before 1970 and is derived in FLAME from the “Mysterioso Pizzicato” cliché melody first published in 1914 and commonly used as a stock device throughout the twentieth century in songs and film music.**

44. In summary, I found that there are no significant melodic similarities between PAPER and FLAME, but there are significant melodic differences. The only relevant melodic similarity is a five-pitch fragment (set to different rhythmic durations and metric placements) and playing scale degree 6 off the beat. The five-pitch fragment is derived from a stock melody that is in the public domain. Playing scale degree 6 off the beat is not remotely significant. Moreover, again, the 5-second Intro is the only portion of FLAME at issue and is a minimal part of FLAME.

45. When combined with my findings regarding structure, harmony, and rhythm, I found that there are no significant structural, harmonic, rhythmic, or melodic similarities, individually or in the aggregate, between FLAME and PAPER and that any similarities are generic and/or thin and fragmentary.

## **II. E. LYRICS**

### **The Lyrics in FLAME and PAPER Are Significantly Different**

46. The lyrics of FLAME are from the perspective of a narrator who is in love to the point of torment. The lyrics describe feelings of helplessness and confusion, using the metaphor of “the flames in [their] heart”. In sharp contrast, the lyrics of PAPER are about the pursuit of money and the besting of competitors. Jay-Z and Foxy Brown’s lyrics boast of their business acumen, status, and drive to “get that paper”. There are no similar lyrical phrases in FLAME and PAPER.

47. In summary, I found that there are no significant lyrical similarities between PAPER and FLAME, but there are significant lyrical differences. Moreover, when combined with my findings regarding structure, harmony, rhythm, and melody, I found that there are no significant structural, harmonic, rhythmic, melodic, or lyrical similarities, individually or in the aggregate, between FLAME and PAPER any similarities are generic and/or thin and fragmentary.

## **II. F. PRIOR ART**

### **The Melody in the 5-second Intro in FLAME Is a Stock Device Interpolation of a Famous Melody Titled “Mysterioso Pizzicato”**

48. As analyzed above in the section on Structure, the only portion at issue in FLAME is the 5-second Intro. (The guitar melody is approximately 3 seconds and the remaining 2 seconds of the Intro in FLAME is a guitar chord.) Again, the expression in the 5-second Intro in FLAME never returns and has no meaningful similarity to the rest of FLAME.

49. The 5-second Intro consists wholly of a brief melody played on a guitar followed by a sustained tremolo guitar chord. The 5-second Intro is an interpolation of a famous cliché melody known as “Mysterioso Pizzicato” (hereafter “MP”). MP is also known as “The Villain” or “The Villain’s Theme”. MP was published in 1914 in *The Remick Folio of Moving Picture Music, vol. I* by Jerome H. Remick & Company. The

interpolation in FLAME of the famous MP melody is merely one of dozens of examples of musical compositions throughout the twentieth century in multiple genres of music and film that use this stock melodic device.

50. **Visual Exhibit A** attached to this report consists of transcriptions of the MP stock device melodic interpolations in **42** musical compositions including brief narratives regarding each work. Presented in chronological order, the first 28 prior art works in **Visual Exhibit A** were released between 1923 and 1970, 1970 being the year in which FLAME was released. The remaining 14 transcriptions are from musical compositions that were released between 1971 and 1994, prior to the 1998 release of PAPER.

51. Drawing from the prior art works in **Visual Exhibit A**, in Musical Examples 10-17 below, transcriptions of **eight** representative prior art works released between 1926 and 1965, i.e., before the **1970** release of FLAME, are placed in comparative transcriptions with the 5-second Intro at issue in FLAME. In each pair of comparative transcriptions, the prior art work is on the top staff and the guitar part in FLAME is on the bottom staff.

52. In each of the comparative transcriptions in Musical Examples 10-17 below, scale degree numbers have been added above the notes on the top staff and below the notes on the bottom staff in Arabic numerals. The Roman numeral “i” indicates a minor i chord (a G minor chord in the key of G minor). Arrows connect identical corresponding pitches in the prior art work and in FLAME in the first comparative transcription in each Musical Example. (As shown in Musical Examples 8 and 9 and analyzed above, the similar pitches between FLAME and PAPER are set to different rhythmic durations and on different metric placements.) In the second comparative transcription in each Musical Example, pitches in FLAME that have a corresponding pitch in the prior art work are **X**'ed out. As shown in five of the eight Musical Examples 10-17 below, after omitting the pitches that are shared between each prior art work and FLAME, only a single pitch (a “C” on scale degree 4) and a musical building block i chord (or part of that chord) remain. In the other three prior art works



comparative transcriptions immediately below, only two non-consecutive pitches (on scale degrees 4 and 1 – a “C” and a “G”) and the musical building block i chord (or part of that chord) remain.

### MUSICAL EXAMPLE 10

#### “Mysterious Mose” #2 in Visual Exhibit A (1926) / FLAME

Comparison of "Mysterious Mose" (0:10) and FLAME (0:00) transcriptions. The top staff shows the melody of "Mysterious Mose" with scale degrees 1, 3, 5, 1, 6, 5, 4, 3, 2, 1. The bottom staff shows the FLAME transcription with scale degrees 1, 3, 4, 5, 1, 6, 5, 4, 3, 2, 1 and a final i chord. Arrows indicate pitch correspondences between the two transcriptions.

Comparison of "Mysterious Mose" (0:10) and FLAME (0:00) transcriptions. The top staff shows the melody of "Mysterious Mose" with scale degrees 1, 3, 5, 1, 6, 5, 4, 3, 2, 1. The bottom staff shows the FLAME transcription with scale degrees 1, 3, 4, 5, 1, 6, 5, 4, 3, 2, 1 and a final i chord. Red 'X' marks indicate shared pitches between the two transcriptions.

53. As shown in Musical Example 10 above, after omitting the pitches that are shared between the prior art work and FLAME, only a single pitch (on scale degree 4) and a musical building block G minor (i) chord in the key of G minor remain. In addition to the iteration at 0:10, the MP melody occurs again at 1:54 and 2:52 in the 1926 “Mysterious Mose”.

## MUSICAL EXAMPLE 11

## "The Skeleton In the Closet" #5 in Visual Exhibit A (1936) / FLAME

The image displays two musical staves for comparison. The top staff is labeled '"The Skeleton in the Closet" 0:09' and the bottom staff is labeled 'FLAME 0:00'. Both are in 4/4 time. The top staff has scale degrees 1, 3, 5, 1, 6 1/2 (trill), 5, 4, 3, 2, 1 written above it. The bottom staff has scale degrees 1, 3, 4, 5, 1, 6, 5, 4, 3, 2, 1 written below it. Red 'x' marks are placed over the notes in the bottom staff that correspond to the notes in the top staff. Arrows point from the notes in the top staff to the corresponding notes in the bottom staff. The bottom staff ends with a 'i' chord.

54. As shown in Musical Example 11 above, after omitting the pitches that are shared between the prior art work and FLAME, only a single pitch (on scale degree 4) and a musical building block *i* chord remain. There is a "trill"<sup>12</sup> on scale degree 6. Moreover, the MP stock device in "The Skeleton in the Closet" is part of an instrumental Intro that precedes the entrance of the vocal melody as in FLAME.

<sup>12</sup> A "trill" is "An ornament consisting of the more or less rapid alternation of a note with the one above...." (*Harvard*, p. 906.)

## MUSICAL EXAMPLE 12

## "Old Man Mose" #6 in Visual Exhibit A (1939) / FLAME

The first musical example shows two staves. The top staff, labeled "Old Man Mose" 0:07, is in 4/4 time with a key signature of two flats. It contains a melody with scale degrees 1, 3, 5, 1, 6, 5, 4, 3, 2, 1 written above it. The bottom staff, labeled FLAME 0:00, is in the same key and time. It contains a melody with scale degrees 1, 3, 4, 5, 1, 6, 5, 4, 3, 2, 1 written below it. Arrows indicate pitch correspondences: the first four notes of the top staff (1, 3, 5, 1) align with the first four notes of the bottom staff (1, 3, 4, 5). The fifth note (1) of the top staff aligns with the fifth note (1) of the bottom staff. The sixth note (6) of the top staff aligns with the sixth note (6) of the bottom staff. The seventh note (5) of the top staff aligns with the seventh note (5) of the bottom staff. The eighth note (4) of the top staff aligns with the eighth note (4) of the bottom staff. The ninth note (3) of the top staff aligns with the ninth note (3) of the bottom staff. The tenth note (2) of the top staff aligns with the tenth note (2) of the bottom staff. The eleventh note (1) of the top staff aligns with the eleventh note (1) of the bottom staff. The final chord of the top staff is a triad (1, 3, 5), and the final chord of the bottom staff is a triad (1, 3, 5).

The second musical example shows the same two staves as the first. The top staff, labeled "Old Man Mose" 0:07, is identical to the first example. The bottom staff, labeled FLAME 0:00, is identical to the first example, but with red X marks placed over the notes corresponding to scale degrees 1, 3, 4, 5, 1, 6, 5, 4, 3, 2, 1. The red X marks are placed over the notes at measures 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11. The final chord of the bottom staff is a triad (1, 3, 5).

55. As shown in Musical Example 12 above, after omitting the pitches that are shared between the prior art work and FLAME, only a single pitch (on scale degree 4) and a musical building block *i* chord remain. The bass part, transcribed in Musical Example 12, plays the melody without a trill on scale degree 6 in "Old Man Mose" at both 0:02 and 0:07.

**MUSICAL EXAMPLE 13****“Peek-A-Boo” #13 in Visual Exhibit A (1958) / FLAME**

The image displays two musical staves, one for "Peek-A-Boo" (0:57) and one for FLAME (0:00), both in 4/4 time. The notation includes scale degrees (1, 3, 5, 1, 6, 5, 4, 3, 2) and chord symbols (i, I). Arrows indicate pitch correspondences between the two pieces. In the FLAME staff, several notes are marked with red 'X' symbols, indicating they are shared with the prior art work. The FLAME staff also includes a final chord symbol 'i' at the end of the sequence.

56. As shown in Musical Example 13 above, after omitting the pitches that are shared between the prior art work and FLAME, only two non-consecutive pitches (on scale degrees 4 and 1) and part of a musical building block *i* chord remain. With the “G” in the bass of bar 3 in “Peek-A-Boo”, the guitar tremolo-like iteration of interchanging *i* and *I* chords is similar to the more fully realized G minor chord in FLAME. In both the prior art work and FLAME, the chord(s) follow the MP melody. Moreover, another iteration of the MP stock device in “Peek-A-Boo” at 0:00 (which is not transcribed above) is part of an instrumental Intro that precedes the entrance of the vocal melody as in FLAME.

**MUSICAL EXAMPLE 14****“Not of This Earth” #18 in Visual Exhibit A (1959) / FLAME**

1 3 5 1 6 5 4 3 2

"Not of This Earth" 0:00

FLAME 0:00

1 3 4 5 1 6 5 4 3 2 1

1 3 5 1 6 5 4 3 2

"Not of This Earth" 0:00

FLAME 0:00

1 3 4 5 1 6 5 4 3 2 1 i

57. As shown in Musical Example 14 above, after omitting the pitches that are shared between the prior art work and FLAME, only two non-consecutive pitches (on scale degrees 4 and 1) and a musical building block *i* chord remain. “Not of This Earth” also includes a tremolo chord played on the piano under scale degree 6. Moreover, this MP stock device in “Not of This Earth” is part of an instrumental Intro that precedes the entrance of the vocal melody as in FLAME.

**MUSICAL EXAMPLE 15****"The Headless Horseman" #21 in Visual Exhibit A (1963) / FLAME**

Musical Example 15 displays two musical staves in 4/4 time, comparing the original piece "The Headless Horseman" (0:10) with the FLAME version (0:00). The notation includes scale degrees (1, 3, 5, 1, 6, 5, 4, 3, 2, i) and fingerings (1, 3, 4, 5, 1, 6, 5, 4, 3, 2, 1, i). Arrows indicate pitch correspondences between the two versions. In the bottom staff, red 'X' marks highlight the non-consecutive pitches 4 and 1, and the 'i' chord, which remain after omitting shared pitches.

58. As shown in Musical Example 15 above, after omitting the pitches that are shared between the prior art work and FLAME, only two non-consecutive pitches (on scale degrees 4 and 1) and part of a musical building block i chord remain.

## MUSICAL EXAMPLE 16

## "Strychnine" #24 in Visual Exhibit A (1965) / FLAME

"Strychnine" 0:02

FLAME 0:00

1 3 5 1 6 5 4 3 2 i5

1 3 4 5 1 6 5 4 3 2 1 i

"Strychnine" 0:02

FLAME 0:00

1 3 5 1 6 5 4 3 2 i5

1 3 4 5 1 6 5 4 3 2 1 i

59. As shown in Musical Example 16 above, after omitting the pitches that are shared between the prior art work and FLAME, only one pitch (on scale degree 4) and part of a musical building block **i** chord remain. "Strychnine" also includes repeated **i5** ("power") chords played on the guitar which is similar to the more fully realized G minor (**i**) chord in FLAME. In both songs, the **i5** and **i** chord(s) follow the MP melody.

**MUSICAL EXAMPLE 17****“Spider Walk” #26 in Visual Exhibit A (1965) / FLAME**

"Spider Walk" 0:04

FLAME 0:00

1 3 5 1 6 5 4 3 2 1 i

1 3 4 5 1 6 5 4 3 2 1 i

60. As shown in Musical Example 17 above, after omitting the pitches that are shared between the prior art work and FLAME, only one pitch (on scale degree 4) and part of a musical building block i chord remain. Moreover, like FLAME, “Spider Walk” includes (a) a fully realized G minor (i) chord, (b) played on the guitar, and (c) iterated immediately after the MP melody. In addition, the MP phrase in “Spider Walk” is part of an instrumental Intro that precedes the entrance of the vocal melody. On the other hand, by way of difference, the G minor chord in “Spider Walk” is not sustained and is not performed with a tremolo effect.



FLAME Added No New Pitches to the MP Stock Device Other Than a Single Pitch That Is Not Even in PAPER

61. In Musical Examples 18-25 below, each of the eight two-part comparative transcriptions in Musical Examples 10-17 is expanded in eight corresponding Musical Examples 18-25 by placing the guitar melody at issue in PAPER on the bottom staff. Since the prior art examples are each three bars long, I have excerpted the three bars of PAPER that share the most similarities with the FLAME guitar melody, i.e., bars 3-5 of the PAPER guitar loop. Scale degree numbers have been added above the notes in Arabic numerals, and the Roman numeral “i” indicates a minor i chord. In the second of the paired tripartite transcriptions in each of the following eight Musical Examples, corresponding pitches (1) that are in the prior art work and/or (2) that are not shared by FLAME and PAPER are **X**’ed out. (As noted above, the metric placements and rhythmic durations of the similar pitches in FLAME and PAPER are different. Accordingly, the criterion for melodic similarity in the placement of the red X’s is that the similar pitches occur in the same chronological sequence in all three songs.) As shown in the eight Musical Examples 18-25 below, after omitting from PAPER the pitches (1) that are shared between each prior art work and FLAME and/or (2) that are not shared by FLAME and PAPER, at most, only a single tonic pitch and a i chord or a portion of a i chord – both common musical building blocks – remain. However, because some of the works that interpolate the MP stock device **also** include both of those, i.e., portions of the building block i chord and the additional tonic scale degree 1, in my opinion FLAME did not contribute those to the MP stock device. In fact, FLAME added no new pitches that are not already in prior examples of the use of MP stock device other than an additional “C” pitch (scale degree 4) *which is wholly insignificant and which is not in PAPER in any event.*

MUSICAL EXAMPLE 18

"Mysterious Mose" (1926) / FLAME / PAPER

"Mysterious Mose" 0:10

FLAME 0:00

PAPER 0:05

The musical score for "Mysterious Mose" (1926) is presented in three parts. The top part, "Mysterious Mose", is in 4/4 time and has a duration of 0:10. It begins with a treble clef and a key signature of one flat. The melody is: G4 (quarter), A4 (quarter), B4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (quarter), C4 (half). The middle part, FLAME, is in 4/4 time and has a duration of 0:00. It begins with a treble clef and a key signature of one flat. The melody is: G4 (quarter), A4 (quarter), B4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (quarter), C4 (half). The bottom part, PAPER, is in 4/4 time and has a duration of 0:05. It begins with a treble clef and a key signature of one flat. The melody is: G4 (quarter), A4 (quarter), B4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (quarter), C4 (half). The score ends with a double bar line and a repeat sign.

"Mysterious Mose" 0:10

FLAME 0:00

PAPER 0:05

The musical score for "Mysterious Mose" (1926) is presented in three parts. The top part, "Mysterious Mose", is in 4/4 time and has a duration of 0:10. It begins with a treble clef and a key signature of one flat. The melody is: G4 (quarter), A4 (quarter), B4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (quarter), C4 (half). The middle part, FLAME, is in 4/4 time and has a duration of 0:00. It begins with a treble clef and a key signature of one flat. The melody is: G4 (quarter), A4 (quarter), B4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (quarter), C4 (half). The bottom part, PAPER, is in 4/4 time and has a duration of 0:05. It begins with a treble clef and a key signature of one flat. The melody is: G4 (quarter), A4 (quarter), B4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (quarter), C4 (half). The score ends with a double bar line and a repeat sign. Red 'x' marks are placed below the notes in the PAPER part.

MUSICAL EXAMPLE 19

"The Skeleton In the Closet" (1936) / FLAME / PAPER

"The Skeleton in the Closet" 0:09

FLAME 0:00

PAPER 0:05

The musical score for "The Skeleton In the Closet" (1936) is presented in three parts. The first part, "The Skeleton in the Closet" (0:09), is in 4/4 time and B-flat major. It features a melody with fingerings 1, 3, 5, 1, 6, 5, 4, 3, 2, 1. A trill is indicated on the 6th note. The second part, FLAME (0:00), also in 4/4 time and B-flat major, has fingerings 1, 3, 4, 5, 1, 6, 5, 4, 3, 2, 1. The third part, PAPER (0:05), in 4/4 time and B-flat major, has fingerings 1, 1, 1, 5, 1, 6, 5, 4, 1, 1, 1, 1. All parts end with a final chord marked with a 'i'.

"The Skeleton in the Closet" 0:09

FLAME 0:00

PAPER 0:05

The musical score for "The Skeleton In the Closet" (1936) is presented in three parts. The first part, "The Skeleton in the Closet" (0:09), is in 4/4 time and B-flat major. It features a melody with fingerings 1, 3, 5, 1, 6, 5, 4, 3, 2, 1. A trill is indicated on the 6th note. The second part, FLAME (0:00), also in 4/4 time and B-flat major, has fingerings 1, 3, 4, 5, 1, 6, 5, 4, 3, 2, 1. The third part, PAPER (0:05), in 4/4 time and B-flat major, has fingerings 1, 1, 1, 5, 1, 6, 5, 4, 1, 1, 1, 1. All parts end with a final chord marked with a 'i'. Red 'x' marks are placed under the notes in the PAPER part.

MUSICAL EXAMPLE 20

“Old Man Mose” (1939) / FLAME / PAPER

"Old Man Mose" 0:02

FLAME 0:00

PAPER 0:05

The musical score for "Old Man Mose" (1939) is presented in three parts: "Old Man Mose", "FLAME", and "PAPER". The key signature is B-flat major (two flats) and the time signature is 4/4. The "Old Man Mose" part starts at 0:02, "FLAME" at 0:00, and "PAPER" at 0:05. Fingerings are indicated by numbers 1-6 above the notes. The "PAPER" part includes red 'x' marks under certain notes.

"Old Man Mose" 0:02

FLAME 0:00

PAPER 0:05

This is a duplicate of the musical score for "Old Man Mose" (1939) featuring three parts: "Old Man Mose", "FLAME", and "PAPER". The key signature is B-flat major (two flats) and the time signature is 4/4. The "Old Man Mose" part starts at 0:02, "FLAME" at 0:00, and "PAPER" at 0:05. Fingerings are indicated by numbers 1-6 above the notes. The "PAPER" part includes red 'x' marks under certain notes.

MUSICAL EXAMPLE 21

"Peek-A-Boo" (1958) / FLAME / PAPER

"Peek-A-Boo" 0:57

FLAME 0:00

PAPER 0:05

1 3 5 1 6 5 4 3 2 i I i I

1 3 4 5 1 6 5 4 3 2 1

1 1 1 5 1 6 5 4 1 1 1 1

"Peek-A-Boo" 0:57

FLAME 0:00

PAPER 0:05

1 3 5 1 6 5 4 3 2 i I i I

1 3 4 5 1 6 5 4 3 2 1

1 1 1 5 1 6 5 4 1 1 1 1

**MUSICAL EXAMPLE 22**

**"Not of This Earth" (1959) / FLAME / PAPER**

"Not of This Earth" 0:00

FLAME 0:00

PAPER 0:05

The musical score for "Not of This Earth" (1959) is presented in three parts. The first part, "Not of This Earth", is in 4/4 time and B-flat major. It begins with a treble clef and a key signature of two flats. The melody is: G4 (quarter), A4 (quarter), Bb4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (half). The second part, FLAME, is in 4/4 time and B-flat major. It begins with a treble clef and a key signature of two flats. The melody is: G4 (quarter), A4 (quarter), Bb4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (half). The third part, PAPER, is in 4/4 time and B-flat major. It begins with a treble clef and a key signature of two flats. The melody is: G4 (quarter), A4 (quarter), Bb4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (half). The PAPER part has a 0:05 timestamp.

"Not of This Earth" 0:00

FLAME 0:00

PAPER 0:05

The musical score for "Not of This Earth" (1959) is presented in three parts. The first part, "Not of This Earth", is in 4/4 time and B-flat major. It begins with a treble clef and a key signature of two flats. The melody is: G4 (quarter), A4 (quarter), Bb4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (half). The second part, FLAME, is in 4/4 time and B-flat major. It begins with a treble clef and a key signature of two flats. The melody is: G4 (quarter), A4 (quarter), Bb4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (half). The third part, PAPER, is in 4/4 time and B-flat major. It begins with a treble clef and a key signature of two flats. The melody is: G4 (quarter), A4 (quarter), Bb4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (half). The PAPER part has a 0:05 timestamp. Red 'X' marks are placed under the notes in the PAPER part.

MUSICAL EXAMPLE 23

"The Headless Horseman" (1963) / FLAME / PAPER

"The Headless Horseman"  
0:10

FLAME  
0:00

PAPER  
0:05

1 3 5 1 6 5 4 3 2 i

1 3 4 5 1 6 5 4 3 2 1

1 1 1 5 1 6 5 4 1 1 1 1

"The Headless Horseman"  
0:10

FLAME  
0:00

PAPER  
0:05

1 3 5 1 6 5 4 3 2 i

1 3 4 5 1 6 5 4 3 2 1

1 1 1 5 1 6 5 4 1 1 1 1

MUSICAL EXAMPLE 24

“Strychnine” (1965) / FLAME / PAPER

"Strychnine" 0:02

FLAME 0:00

PAPER 0:05

1 3 5 1 6 5 4 3 2 i5

1 3 4 5 1 6 5 4 3 2 1

1 1 1 5 1 6 5 4 1 1 1 1

"Strychnine" 0:02

FLAME 0:00

PAPER 0:05

1 3 5 1 6 5 4 3 2 i5

1 3 4 5 1 6 5 4 3 2 1

1 1 1 5 1 6 5 4 1 1 1 1



MUSICAL EXAMPLE 25

“Spider Walk” (1965) / FLAME / PAPER

"Spider Walk" 0:04

FLAME 0:00

PAPER 0:05

"Spider Walk" 0:04

FLAME 0:00

PAPER 0:05

62. In summary, when combined with my findings regarding structure, harmony, rhythm, melody, and lyrics, I found that there are no significant structural, harmonic, rhythmic, melodic, or lyrical similarities, individually or in the aggregate, between FLAME and PAPER. Furthermore, outside of playing a single note (scale degree 6) off the beat, which is an insignificant similarity, the thin and fragmentary similarities between FLAME and PAPER are found in prior art and are a function of the stock device use of the famous MP melody in FLAME.

## **II. G. FLAME and PAPER in Their Entirety**

### **FLAME and PAPER Are Significantly Different Musical Compositions in Their Entireties**

63. Overall, the similarities between FLAME and PAPER are minimal and substantially comprised of public domain materials. FLAME is a blues-based soul song with sung vocals. PAPER is a hip-hop song with rapped vocals. As discussed above, FLAME has several different harmonic progressions occurring in different sections of the song, while PAPER has the same harmony throughout. The drum beat in FLAME is relatively consistent, while the drum beat in PAPER is highly dynamic with much rhythmic variety and sudden drop-outs.

64. The 5-second Intro at issue in FLAME consists of the guitar alone which precedes the entrance of the vocal part in Verse 1. By way of difference, the Intro of PAPER includes guitar, drums, and a vocal rap. Moreover, as shown in **Visual Exhibit A**, 11 prior art works<sup>13</sup> (released before 1970) include the use of the MP melody as part of an instrumental Intro that precedes the entrance of the vocal melody. Thus, the idea in FLAME of using the stock device MP melody in an instrumental Intro preceding the vocal melody was already common before 1970.

65. The 5-second Intro is a minimal part of FLAME and a stock device interpolation of “Mysterioso Pizzicato”. It is not part of the body of the FLAME song. The body of FLAME starts with the vocal pickup at 0:05 after the Intro. A “cover”

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<sup>13</sup> See the transcriptions and narratives in #1, #2, #9, #11, #13, #14, #18, #19, #22, #26, and #28.

version of FLAME that omits this brief Intro would still be a “cover” of the “whole song”. The fact that the 5-second Intro is omitted from the FLAME 1979 sheet music deposit copy supports this finding. Again, in addition to being quantitatively insignificant, the 5-second Intro is qualitatively insignificant to FLAME as a whole.

### **III. ANALYSIS of FLAME AND TOE**

66. As discussed above, pursuant to my musicological practice, in this section I analyze FLAME and TOE from the perspective of their entireties, along with my comparative analysis of the only material at issue in FLAME ( the 5-second Intro) and TOE.

#### **III. A. STRUCTURE/FORM**

##### **The Overall Structures in FLAME and TOE Are Significantly Different**

67. As noted above, a structural chart provides a map of the structural sections in a musical composition. The comparative chart of the respective structures in FLAME and TOE presented immediately below include the starting time of each section (within 1 second), the name of each structural section, and the number of full bars in each structural section.

<b>FLAME</b>			<b>TOE</b>		
<b>STRUCTURAL CHART</b>			<b>STRUCTURAL CHART</b>		
00:00	Intro	3 bars	00:00	Intro	4 bars
00:05	Verse 1	8 bars	00:11	Chorus 1	8 bars
00:24	Pre-chorus 1	4 bars	00:33	Verse 1	8 bars
00:33	Chorus 1	7 bars	00:55	Pre-chorus 1	4 bars
00:47	Verse 2	8 bars	01:06	Chorus 2	8 bars
01:06	Pre-chorus 2	4 bars	01:28	Verse 2	4 bars
01:15	Chorus 2	7 bars	01:39	Pre-chorus 2	4 bars
01:30	Bridge	13 bars	01:50	Chorus 3	8 bars
01:58	Verse 3	8 bars	(ends at 2:15)		

02:16	Pre-chorus 3	4 bars
02:25	Chorus 3	8 bars
02:43	Outro	13 bars

(ends at 3:12 including fade)

68. As demonstrated in the comparative chart above, FLAME and TOE incorporate generic structural building blocks in music through the use of Intro, Verse, Pre-chorus, Chorus, and Outro sections. By way of difference, the Intro is followed by a Verse in FLAME but by a Chorus in TOE. In TOE, all of the Chorus sections are 8 bars long, but in FLAME, the first two Chorus sections are 7 bars long. In FLAME, all of the Verse sections are 8 bars long, but in TOE, Verse 2 is 4 bars long. By way of further difference, FLAME has Bridge and Outro sections, which TOE does not.

69. As respectively heard on Tracks 1 and 3 of **Audio Exhibit 1**, while the guitar plays alone in the Intro (preceding any vocal part) in FLAME, in TOE the guitar, sub-bass, and spoken vocals are all present in the Intro.

70. As noted above, the only portion that is at issue in FLAME is the brief 5-second Intro. The expression at issue in the 5-second Intro in FLAME never returns and has no meaningful similarity with the rest of FLAME.

71. In summary, I found that there are no significant structural similarities between the two songs, but there are significant structural differences. Any structural similarities are generic and commonly found in songs that predate 1970.

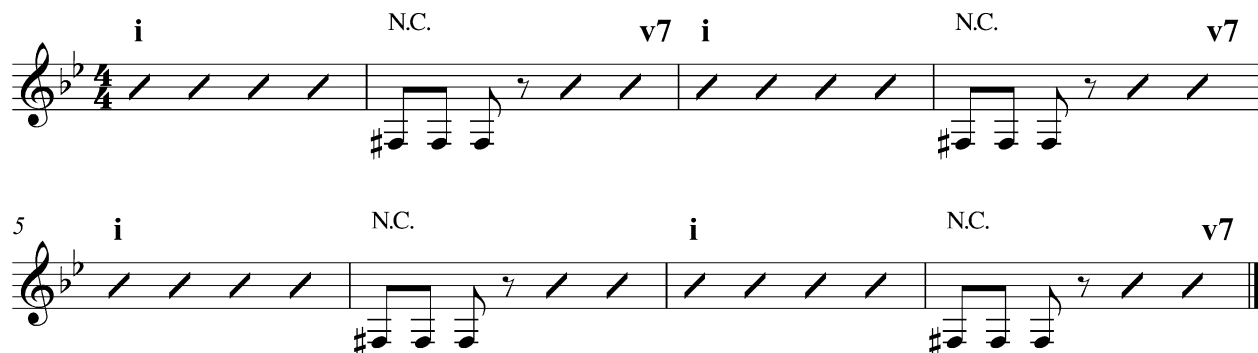
### **III. B. HARMONY**

#### **The Chord Progressions in FLAME and TOE Are Significantly Different**

72. Both FLAME and TOE are in the key of G minor, a commonplace key in popular music. The key of G minor is a fundamental musical building block.

73. The various chord progressions in FLAME were shown in Musical Examples 1-4 earlier in this report. Musical Example 26 below shows the 8-bar chord progression used throughout TOE.<sup>14</sup>

**MUSICAL EXAMPLE 26**  
**The Chord Progression in TOE**



74. As shown in Musical Examples 1-4 earlier in this report, the basic chord progressions (harmony) in FLAME are as follows.

<b>i-IV-V-i</b>	(in the Verse)
<b>V-IV-bIII-IV-V</b>	(in the Pre-chorus)
<b>bIII-i-V-i-IV-i-bVII</b>	(in the Chorus)
<b>i-IV-i-IV-i-IV-i-bIII-</b>	
<b>IV-V-bIII-i-bVII</b>	(in the Bridge)

75. By way of significant difference, the basic harmony in TOE consists of the following eight-bar chord progression.

<sup>14</sup> The “N.C.” symbol stands for “no chord”, indicating that there is no harmonic (chordal) content. In lieu of a chord symbol, notes in the guitar part that occur during those beats are included.

**i-N.C.-v7-i-N.C.-v7-i-N.C.- i-N.C.-v7** (throughout)

76. The only remotely similar harmonic movement is from **V** to **i** in the Verse and Chorus of FLAME as compared to the **v7** to **i** movement in TOE. However, a minor **v7** chord is not the same as a major **V** chord, and **V-i** and **v-i** paired chord movements have been fundamental building blocks in Western music for centuries.

77. By way of difference, the harmony in TOE is minimal, consisting of only two chords (**i** and **v7**), while FLAME contains a variety of chords and chord progressions.

78. In addition, the harmonic rhythm (i.e., the rate of change of the chords) is different in FLAME and TOE. For example, while the harmonic rhythm in TOE includes rapid changes from the **v7** to **i** chords (see bars 2-3 and 4-5 of Musical Example 26 above), there is no similar harmonic rhythm in FLAME. Thus, the overall harmonic contexts in FLAME and TOE are very different.

79. In summary, I found that there are no significant harmonic similarities between the two songs, but there are significant harmonic differences. Moreover, when combined with my findings regarding structure (above), I found that there are no significant structural and/or harmonic similarities, individually or in the aggregate, between FLAME and TOE and that any similarities are generic.

### **III. C. RHYTHM**

#### **The Overall Rhythmic Flow and Feel in FLAME and TOE Are Significantly Different**

80. FLAME and TOE are in 4/4 meter, also known as “common time”. As explained in footnote 7 above, in 4/4 meter, a bar consists of four beats, each with the value of a “quarter note”. Also as noted above, 4/4 meter has been a musical building block for centuries.

81. The tempo in the first three seconds of the 5-second Intro in FLAME is about 171 BPM. Starting from the tremolo guitar just after the three-second mark, the tempo slows down drastically, staying at an average tempo of about 110 BPM, with

slight variations, for the remainder of the song. Thus, the tempo of the 5-second Intro of FLAME is very different from the tempo in the remainder of FLAME. The tempo throughout TOE is slower than the tempos in FLAME and fixed at approximately 87 BPM.

82. The overall rhythmic flow and feel are different in FLAME and TOE and, specifically, the guitar rhythms, bass guitar rhythms, and drum rhythms are mostly different in FLAME and TOE. There are no significant rhythmic similarities in the overall rhythmic flow and feel in FLAME and TOE.

83. In summary, I found that there are no significant rhythmic similarities between the two songs, but there are significant rhythmic differences. Moreover, when combined with my findings regarding structure and harmony, I found that there are no significant structural, harmonic, and/or rhythmic similarities, individually or in the aggregate, between FLAME and TOE, and that any similarities are generic and/or thin and fragmentary.

### **III. D. MELODY**

#### **There Is No Significant Melodic Similarity Between FLAME and TOE**

84. Again, the 5-second Intro in FLAME consists wholly of playing on a guitar. All of the guitar music at issue in the Intro of FLAME is transcribed in Musical Example 27 below. As noted above, the only portion at issue in FLAME is the 5-second Intro, the expression in which never repeats in Flame and has no meaningful similarity to the rest of FLAME. This 5-second Intro represents a minimal part of FLAME.

**MUSICAL EXAMPLE 27**  
**The 5-second Intro in FLAME**

At 0:00



85. As shown in Musical Example 27 immediately above, the 5-second Intro of FLAME consists of a brief (approximately 3-seconds) solo guitar melody followed by a sustained tremolo guitar chord from approximately 0:03 to 0:05. The Verse 1 vocal melody in FLAME enters by 0:05, is not similar to TOE, and is not at issue.

86. In Musical Example 27 above, the first five notes of the guitar part are a pickup (see footnote 11 above) to the first full bar marked bar “1”. The “G” at the end of the descending scale is clearly on the downbeat (beat 1) in bar 2. The strength of the “G” as a downbeat reinforces the pickup status and metric placements of the first five notes in the guitar part at issue in FLAME.

87. The expression at issue in TOE is a fragmentary part of an eight-bar melody shown below in Musical Example 28 immediately below.

**MUSICAL EXAMPLE 28**  
**The Guitar Melody in TOE**

At 0:00





88. The guitar melody in TOE transcribed in Musical Example 28 immediately above is “looped” (repeated) and consists of four 2-bar melodic phrases: bars 1-2, bars 3-4, bars 5-6, and bars 7-8. There are no pickup notes in any of these 2-bar melodic phrases. Each 2-bar phrase starts with a single “G” (scale degree 1). The chords occur near the beginning (on beat 1&) of 2-bar phrases in bars 1 and 5.

89. Musical Example 29 below is a comparative transcription of the 5-second Intro at issue in FLAME (on the top staff) and bars 1-4 of the guitar melody in TOE (on the bottom staff). Scale degree numbers have been added above the notes on the top staff and below the notes on the bottom staff in Arabic numerals. The Roman numeral “i” indicates a minor i chord, that is, a G minor chord in the key of G minor. A minor i chord in a minor key is a fundamental musical building block.

**MUSICAL EXAMPLE 29**

**5-Second Intro in FLAME (pickup and bars 1-3) and**  
**Guitar Melody in TOE (bars 1-4)**

FLAME 0:00

TOE 0:00

90. Insofar as bars 1-4 in TOE consist of two, 2-bar melodic phrases as shown in Musical Examples 28 and 29 above, in the chart immediately below, scale degree numbers and corresponding bars in bars 1-2 and bars 3-4 of TOE are presented under the corresponding bars of the 5-second Intro in FLAME. As shown in Musical Example 29 above, the guitar notes and chords in each song are as follows.

FLAME Intro	1 3 4 5 1	6 5 4 3 2	1 i
TOE (bars 1-2)	1 i	5 1 6 5 4	7 7 7 4 b7 #4
TOE (bars 3-4)	1	5 1 6 5 4	7 7 7 4 b7 #4 (1 in bar 8, see footnote 14)

91. As transcribed in Musical Example 29 and charted above, the melodic similarities are as follows.

- Both start on scale degree 1.
- Both play scale degree 6 off the beat.
- Both contain a five-pitch sequence on scale degrees 5-1-6-5-4.

92. The melodic differences are as follows:

- The 5-1-6-5-4 pitch sequence is set to different rhythmic durations and metric positions in FLAME and TOE.
- TOE contains scale degrees #4, b7, and 7, while FLAME does not; and FLAME contains scale degree 3, while TOE does not.
- TOE contains consecutive iterations of scale degree 7 (F#), while FLAME contains no consecutive iterations of any note and does not contain any F#'s.
- The melodic phrase structure in FLAME is a pickup (of 5 notes) followed by 2 bars of melody and a chord, while in TOE the melodic phrase structure is four 2-bar phrases without any pickup notes.
- The chord in FLAME occurs after the guitar melody on beat 3 of bar 2, while the chord in TOE occurs on beat 1& of bar 1, which is almost at the beginning (not at the end) of the 2-bar melodic phrase in bars 1-2.

- While the overall eight-bar melody in TOE (see Musical Example 28 above) contains 50 notes and 2 strummed chords, the FLAME melody contains 11 notes and 1 strummed chord.
- Other than the generic building block of consecutive eighth notes (but set to different corresponding pitches in FLAME and TOE), there are no significant similarities between the melodic rhythms in FLAME and TOE<sup>15</sup>.

93. **As with PAPER and FLAME, the only relevant melodic similarity between TOE and FLAME is a five-pitch fragment on scale degrees 5-1-6-5-4, which five pitches are set to (a) different rhythmic durations and (b) different metric placements (within beats), and playing scale degree 6 off the beat (which is an insignificant similarity). As my analysis of prior art shows below, this five-pitch fragment is commonplace and derived from the “Mysterioso Pizzicato” cliché melody that is in the public domain.**

94. In summary, I found that there are no significant melodic similarities between TOE and FLAME, but there are significant melodic differences. The only relevant melodic similarity between the 5-second Intro in Flame and Toe is a five-pitch fragment (set to very different rhythmic durations and metric placements) in the guitar parts, which is entirely found in and derived from a melody in the public domain, and a single pitch on scale degree 6 that is played off the beat (which is an insignificant similarity). Again, the 5-second Intro is the only portion of FLAME that is at issue, is heard only once in FLAME, and is a minimal part of FLAME.

95. When combined with my findings regarding structure, harmony, and rhythm, I found that there are no significant structural, harmonic, rhythmic, or melodic

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<sup>15</sup> As shown in Musical Example 28 above, bars 5-8 in TOE repeat bars 1-4 with the exception of the additional note “G” at the end of bar 8. On that basis, a second set of transcriptions, charted scale degrees, and narrative analyses is not necessary. The additional scale degree 1 at the end of bar 8 has been parenthetically added to the chart above which references this footnote.

similarities, individually or in the aggregate, between FLAME and TOE and that any similarities are generic and/or thin and fragmentary.

### **III. E. LYRICS**

#### **The Lyrics in FLAME and TOE Are Significantly Different**

96. As analyzed earlier in this report, the lyrics of FLAME are from the perspective of a narrator who is in love to the point of torment. In sharp contrast, the lyrics of TOE are a rap-style “braggadocio” in which Ginuwine boasts of their (his and producer Timbaland’s) superiority over weaker competitors in the business.

97. In summary, I found that there are no significant lyrical similarities between TOE and FLAME, but there are significant lyrical differences. Moreover, when combined with my findings regarding structure, harmony, rhythm, and melody, I found that there are no significant structural, harmonic, rhythmic, melodic, or lyrical similarities, individually or in the aggregate, between FLAME and TOE and that any similarities are generic and/or thin and fragmentary.

### **III. F. PRIOR ART**

#### **The 5-second Intro in FLAME Is a Stock Device Interpolation of a Famous Melody Titled “Mysterioso Pizzicato” First Published in 1914**

98. As analyzed above, the only portion at issue in FLAME is the 5-second Intro, i.e., 5 seconds out of a total of 192 seconds in FLAME. (The guitar melody is approximately 3 seconds and the remaining 2 seconds is a guitar chord.) Again, the brief expression in the 5-second Intro never repeats in FLAME, has no meaningful similarity to the remainder of FLAME, and represents a minimal part of FLAME.

99. As shown earlier in this report, the 5-second Intro of FLAME wholly consists of a brief melody played on a guitar followed by a sustained guitar chord. The guitar melody is an interpolation of a famous cliché melody known as “Mysterioso Pizzicato” (MP), first published in 1914. The interpolation in FLAME of the MP melody

is merely one of dozens of examples of musical compositions throughout the twentieth century in multiple genres of music and film that use this stock device.

100. As noted earlier in this report, **Visual Exhibit A** consists of transcriptions of the MP stock device melodic interpolations in **42** musical compositions including brief narratives regarding each prior art work. Presented in chronological order, the first 28 prior art works were released between 1923 and 1970. The remaining 14 transcriptions are of musical compositions that were released between 1971 and 1994, prior to the 1999 release of TOE.

101. Drawing from the prior art works in **Visual Exhibit A**, in Musical Examples 10-17 earlier in this report, transcriptions of **eight** representative prior art works released between 1926 and 1965, i.e., before the 1970 release of FLAME, are placed in comparative transcriptions with the guitar Intro at issue FLAME. As shown in five of the eight Musical Examples 10-17 above, after omitting the pitches that are shared between each prior art work and FLAME, only a single pitch (on scale degree 4) and a musical building block *i* chord remain. In the other three prior art works, only two non-consecutive pitches (on scale degrees 4 and 1) and the musical building block *i* chord remain.

#### FLAME Added No New Pitches to the MP Stock Device Other than a Single Pitch that Is Not Even in TOE

102. In Musical Examples 30-37 below, each of the eight two-part comparative transcriptions in Musical Examples 10-17 is expanded in eight corresponding Musical Examples 30-37 by placing the guitar melody at issue in TOE on the bottom staff. Since the prior art examples are each three bars long, I have excerpted the three bars of TOE that share the most similarities with the FLAME guitar melody, i.e., bars 3-5 of the TOE guitar loop. Scale degree numbers have been added above the notes in Arabic numerals, and the Roman numeral “i” indicates a minor *i* chord. In the second of the paired tripartite transcriptions in each of the following eight Musical Examples, corresponding pitches (1) that are in the prior art work and/or (2) that are not shared by FLAME and TOE are **X**'ed out. (As noted above, the metric placements and rhythmic

durations of the similar pitches in FLAME and TOE are different. Accordingly, the criterion for melodic similarity in the placement of the red X's is that the similar pitches occur in the same chronological sequence in all three songs.) As shown in the eight Musical Examples 30-37 below, after omitting the pitches (1) that are shared between each prior art work and FLAME and/or (2) that are not shared by FLAME and TOE, at most, only a single tonic pitch and a *i* chord – both common musical building blocks – remain. However, because some of the prior art works that interpolate the MP stock device **also** include both of those, i.e., portions of the building block *i* chord and the additional tonic scale degree 1, in my opinion FLAME did not contribute those to the MP stock device. In fact, FLAME added no new pitches that are not already in prior examples of the use of MP stock device other than an additional “C” pitch (scale degree 4) *which is wholly insignificant and which is not in TOE in any event.*

MUSICAL EXAMPLE 30

"Mysterious Mose" (1926) / FLAME / TOE

"Mysterious Mose" 0:10

FLAME 0:00

TOE 0:06

The musical notation for "Mysterious Mose" (1926) is presented in three staves. The top staff, labeled "Mysterious Mose" with a time signature of 0:10, shows a melody in 4/4 time with a key signature of one flat. The melody is: G4 (quarter), A4 (quarter), B4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (quarter), C4 (half). The middle staff, labeled FLAME with a time signature of 0:00, shows a similar melody: G4 (quarter), A4 (quarter), B4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (quarter), C4 (half). The bottom staff, labeled TOE with a time signature of 0:06, shows a more complex melody: G4 (quarter), A4 (quarter), B4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (quarter), C4 (half). The TOE staff includes a final measure with a fermata and a 'i' marking.

"Mysterious Mose" 0:10

FLAME 0:00

TOE 0:06

The musical notation for "Mysterious Mose" (1926) is presented in three staves. The top staff, labeled "Mysterious Mose" with a time signature of 0:10, shows a melody in 4/4 time with a key signature of one flat. The melody is: G4 (quarter), A4 (quarter), B4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (quarter), C4 (half). The middle staff, labeled FLAME with a time signature of 0:00, shows a similar melody: G4 (quarter), A4 (quarter), B4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (quarter), C4 (half). The bottom staff, labeled TOE with a time signature of 0:06, shows a more complex melody: G4 (quarter), A4 (quarter), B4 (quarter), A4 (quarter), G4 (quarter), F4 (quarter), E4 (quarter), D4 (quarter), C4 (half). The TOE staff includes a final measure with a fermata and a 'i' marking. Red 'x' marks are placed below the TOE staff.

MUSICAL EXAMPLE 31

"The Skeleton In the Closet" (1936) / FLAME / TOE

"The Skeleton in the Closet" 0:09

FLAME 0:00

TOE 0:06

The musical notation for "The Skeleton In the Closet" consists of three staves. The top staff is the vocal melody, starting with a quarter note G4, followed by quarter notes A4, Bb4, and C5, then a half note Bb4, and ending with a quarter note G4. Above the first measure are fingerings 1, 3, 5, 1. Above the second measure is a trill (tr) with a half note (1/2) and a wavy line, followed by fingerings 5, 4, 3, 2, 1. The middle staff is the FLAME accompaniment, starting with a quarter rest, followed by quarter notes G4, A4, Bb4, and C5, then a half note Bb4, and ending with a quarter note G4. Above the first measure are fingerings 1, 3, 4, 5, 1. Above the second measure are fingerings 6, 5, 4, 3, 2, 1. The bottom staff is the TOE accompaniment, starting with a quarter note G4, followed by quarter notes A4, Bb4, and C5, then a half note Bb4, and ending with a quarter note G4. Above the first measure is a fingering 1. Above the second measure are fingerings 5, 1, 6, 5, 4. Above the third measure are fingerings 7, 7, 7, 4, b7, #4. Above the fourth measure is a fingering 1. Above the fifth measure are fingerings 1, 5, 1, 6, 5, 4. The key signature has two flats and the time signature is 4/4.

"Mysterious Mose" 0:10

FLAME 0:00

TOE 0:06

The musical notation for "Mysterious Mose" consists of three staves. The top staff is the vocal melody, starting with a quarter note G4, followed by quarter notes A4, Bb4, and C5, then a half note Bb4, and ending with a quarter note G4. Above the first measure are fingerings 1, 3, 5, 1. Above the second measure are fingerings 6, 5, 4, 3, 2, 1. The middle staff is the FLAME accompaniment, starting with a quarter rest, followed by quarter notes G4, A4, Bb4, and C5, then a half note Bb4, and ending with a quarter note G4. Above the first measure are fingerings 1, 3, 4, 5, 1. Above the second measure are fingerings 6, 5, 4, 3, 2, 1. The bottom staff is the TOE accompaniment, starting with a quarter note G4, followed by quarter notes A4, Bb4, and C5, then a half note Bb4, and ending with a quarter note G4. Above the first measure is a fingering 1. Above the second measure are fingerings 5, 1, 6, 5, 4. Above the third measure are fingerings 7, 7, 7, 4, b7, #4. Above the fourth measure is a fingering 1. Above the fifth measure are fingerings 1, 5, 1, 6, 5, 4. The key signature has two flats and the time signature is 4/4. Red 'x' marks are placed below the TOE staff for the first measure, the second measure, the third measure, the fourth measure, the fifth measure, the sixth measure, the seventh measure, the eighth measure, the ninth measure, the tenth measure, the eleventh measure, the twelfth measure, the thirteenth measure, the fourteenth measure, the fifteenth measure, the sixteenth measure, the seventeenth measure, the eighteenth measure, the nineteenth measure, the twentieth measure, the twenty-first measure, the twenty-second measure, the twenty-third measure, the twenty-fourth measure, the twenty-fifth measure, the twenty-sixth measure, the twenty-seventh measure, the twenty-eighth measure, the twenty-ninth measure, the thirtieth measure, the thirty-first measure, the thirty-second measure, the thirty-third measure, the thirty-fourth measure, the thirty-fifth measure, the thirty-sixth measure, the thirty-seventh measure, the thirty-eighth measure, the thirty-ninth measure, the fortieth measure, the forty-first measure, the forty-second measure, the forty-third measure, the forty-fourth measure, the forty-fifth measure, the forty-sixth measure, the forty-seventh measure, the forty-eighth measure, the forty-ninth measure, the fiftieth measure, the fifty-first measure, the fifty-second measure, the fifty-third measure, the fifty-fourth measure, the fifty-fifth measure, the fifty-sixth measure, the fifty-seventh measure, the fifty-eighth measure, the fifty-ninth measure, the sixtieth measure, the sixty-first measure, the sixty-second measure, the sixty-third measure, the sixty-fourth measure, the sixty-fifth measure, the sixty-sixth measure, the sixty-seventh measure, the sixty-eighth measure, the sixty-ninth measure, the seventieth measure, the seventy-first measure, the seventy-second measure, the seventy-third measure, the seventy-fourth measure, the seventy-fifth measure, the seventy-sixth measure, the seventy-seventh measure, the seventy-eighth measure, the seventy-ninth measure, the eightieth measure, the eighty-first measure, the eighty-second measure, the eighty-third measure, the eighty-fourth measure, the eighty-fifth measure, the eighty-sixth measure, the eighty-seventh measure, the eighty-eighth measure, the eighty-ninth measure, the ninetieth measure, the ninety-first measure, the ninety-second measure, the ninety-third measure, the ninety-fourth measure, the ninety-fifth measure, the ninety-sixth measure, the ninety-seventh measure, the ninety-eighth measure, the ninety-ninth measure, the one hundred measure.



MUSICAL EXAMPLE 32

“Old Man Mose” (1939) / FLAME / TOE

"Old Man Mose" 0:02

FLAME 0:00

TOE 0:06

The musical notation for "Old Man Mose" (1939) is presented in three staves. The top staff, labeled "Old Man Mose" with a time signature of 0:02, shows a melody in 4/4 time with fingerings 1 3 5 1 6 5 4 3 2 1. The middle staff, labeled FLAME with a time signature of 0:00, shows a similar melody with fingerings 1 3 4 5 1 6 5 4 3 2 1. The bottom staff, labeled TOE with a time signature of 0:06, shows a more complex melody with fingerings 1 5 1 6 5 4 7 7 7 4 b7 #4 1 5 1 6 5 4. A final 'i' marking is present at the end of the TOE staff.

"Old Man Mose" 0:02

FLAME 0:00

TOE 0:06

The musical notation for "Old Man Mose" (1939) is presented in three staves, identical to the first block. The top staff, labeled "Old Man Mose" with a time signature of 0:02, shows a melody in 4/4 time with fingerings 1 3 5 1 6 5 4 3 2 1. The middle staff, labeled FLAME with a time signature of 0:00, shows a similar melody with fingerings 1 3 4 5 1 6 5 4 3 2 1. The bottom staff, labeled TOE with a time signature of 0:06, shows a more complex melody with fingerings 1 5 1 6 5 4 7 7 7 4 b7 #4 1 5 1 6 5 4. A final 'i' marking is present at the end of the TOE staff. Red 'x' marks are placed below the TOE staff, indicating specific notes.



MUSICAL EXAMPLE 34

“Not of This Earth” (1959) / FLAME / TOE

"Not of This Earth" 0:00

FLAME 0:00

TOE 0:06

The musical notation for "Not of This Earth" (1959) is presented in three staves. The top staff is for the vocal line, the middle for FLAME, and the bottom for TOE. The key signature is two flats (B-flat and E-flat), and the time signature is 4/4. The TOE part includes red 'x' marks under certain notes, indicating specific musical elements or errors.

1 3 5 1 6 5 4 3 2

1 3 4 5 1 6 5 4 3 2 1

1 5 1 6 5 4 7 7 7 4 b7 #4 1 5 1 6 5 4

"Not of This Earth" 0:00

FLAME 0:00

TOE 0:06

The musical notation for "Not of This Earth" (1959) is presented in three staves. The top staff is for the vocal line, the middle for FLAME, and the bottom for TOE. The key signature is two flats (B-flat and E-flat), and the time signature is 4/4. The TOE part includes red 'x' marks under certain notes, indicating specific musical elements or errors.

1 3 5 1 6 5 4 3 2

1 3 4 5 1 6 5 4 3 2 1

1 5 1 6 5 4 7 7 7 4 b7 #4 1 5 1 6 5 4

MUSICAL EXAMPLE 35

"The Headless Horseman" (1963) / FLAME / TOE

"The Headless Horseman"  
0:10

FLAME  
0:00

TOE  
0:06

1 3 5 1 6 5 4 3 2 i

1 3 4 5 1 6 5 4 3 2 1

1 5 1 6 5 4 7 7 7 4 b7 #4 1 5 1 6 5 4

"The Headless Horseman"  
0:10

FLAME  
0:00

TOE  
0:06

1 3 5 1 6 5 4 3 2 i

1 3 4 5 1 6 5 4 3 2 1

1 5 1 6 5 4 7 7 7 4 b7 #4 1 5 1 6 5 4

MUSICAL EXAMPLE 36

“Strychnine” (1965) / FLAME / TOE

"Strychnine" 0:02

FLAME 0:00

TOE 0:06

MUSICAL EXAMPLE 37

“Spider Walk” (1965) / FLAME / TOE

"Spider Walk" 0:04

FLAME 0:00

TOE 0:06

1 3 5 1 6 5 4 3 2 1 i

1 3 4 5 1 6 5 4 3 2 1

1 5 1 6 5 4 7 7 7 4 b7 #4 1 5 1 6 5 4

"Spider Walk" 0:04

FLAME 0:00

TOE 0:06

1 3 5 1 6 5 4 3 2 1 i

1 3 4 5 1 6 5 4 3 2 1

1 5 1 6 5 4 7 7 7 4 b7 #4 1 5 1 6 5 4

103. In summary, when combined with my findings regarding structure, harmony, rhythm, melody, and lyrics, I found that there are no significant structural, harmonic, rhythmic, melodic, or lyrical similarities, individually or in the aggregate, between FLAME and TOE and that the thin and fragmentary similarities are found in prior art.

### **III. G. FLAME and TOE in Their Entirety**

#### **FLAME and TOE Are Significantly Different Musical Compositions in their Entireties**

104. Overall, the similarities between FLAME and TOE are minimal and substantially comprised of public domain material. FLAME is a blues-based soul song with sung vocals. TOE is an R&B song heavily influenced by hip-hop. As discussed above, FLAME has several different harmonic progressions occurring in different sections of the song, while TOE has the same harmony throughout. The drum beat in FLAME is relatively consistent, while the drum beat in TOE is highly dynamic with much rhythmic variety and sudden drop-outs.

105. In the 5-second Intro in FLAME, the guitar plays alone and precedes the entrance of the vocal part. By way of difference, the Intro of TOE includes guitar, sub-bass, and spoken vocals. Moreover, as noted above and as shown in **Visual Exhibit A**, 11 prior art works<sup>16</sup> (released before 1970) include the MP melody as part of an instrumental Intro that precedes the entrance of the vocal melody. Thus, the idea in FLAME of using the stock device MP melody in an instrumental Intro preceding the vocal melody was already common before 1970.

106. The 5-second Intro is a minimal part of FLAME and a stock device interpolation of “Mysterioso Pizzicato” that is not part of the body of the FLAME song. The body of FLAME starts with the vocal pickup at 0:05 after the Intro. A “cover” version of FLAME that omits this brief Intro would still be a “cover” of the “whole song”. The fact that the 5-second Intro is omitted from the FLAME sheet music deposit copy in

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<sup>16</sup> See the transcriptions and narratives in #1, #2, #9, #11, #13, #14, #18, #19, #22, #26, and #28 in **Visual Exhibit A**.

1969 supports this finding. Again, on the basis of my musicological analysis, I found that in addition to being quantitatively insignificant, the 5-second Intro is qualitatively insignificant to FLAME as a whole.

#### **IV. RESPONSE TO THE BENNETT REPORT**

107. I was asked to review and respond to a report by Dr. Joe Bennett dated September 8, 2019 (“the Bennett Report”).<sup>17</sup> Paragraphs are not numbered in the Bennett report.

108. The transcriptions proffered in the Bennett Report differ from mine at least slightly in each case:

- (a) The Bennett Report’s transcription of the guitar riff in the 5-second Intro of FLAME (see Fig. 1 on page 3 of the Bennett Report) is basically identical to mine, except that the Bennett transcription starts one beat earlier. Footnote 2 on page 3 of the Bennett Report states that the rhythmic placement is how Bennett “subjectively hear[s] Hines’s timing”. By way of difference, I hear the last “G” of the guitar melody (before the final tremolo chord) as a strong downbeat, hence my decision to start the melody one beat later on the second half of beat 2. Despite this difference, our transcriptions agree on the relative timing and note durations of the 5-second Intro.
- (b) The Bennett report’s transcription of the guitar in PAPER (see Fig. 3 on page 5 of the Bennett Report) differs from mine in that it includes additional iterations of the low “G” note, for example, the last note in bar 1 and the first note in bar 2. These additional notes are part of the “Guitar 2” part, as transcribed in my Musical Example 7 at page 14 of this report. The Bennett Report does not explain why these notes are included in Fig.3 but the other notes in the Guitar 2 part are omitted. Given that the Guitar 2 part is

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<sup>17</sup> My rebuttal focuses on the compositional comparisons presented in the Bennett Report.



separated in the stereo mix from the more prominent Guitar 1 part, I do not consider these additional notes to be part of the “main” guitar melody.

- (c) The Bennett Report’s transcription of the guitar in TOE (see Fig. 4 at page 6) contains a number of errors. The fourth, fifth, and sixth notes in bar 2 are mistakenly transcribed one half step higher than the recording (“C#”, “F#”, and “D” instead of the correct “C”, “F”, and “C#”). Furthermore, the last two notes in bar 2 of Fig. 4 simply do not exist in the recording.

109. Regardless of these transcription differences, the public domain source of the compositional material in the 5-second Intro is admitted by Bennett. The Bennett Report finds on page 4 that the 5-second Intro is a “musical allusion to the famous *Mysterioso Pizzicato*” melody. While the Bennett Report agrees that the 5-second Intro is derived from “*Mysterioso Pizzicato*”, the similarity is so extensive as to constitute an “interpolation”, not merely an “allusion”.

110. The next sentence on page 4 of the Bennett Report asserts that “Ernie Hines’s guitar part uses some different pitches and rhythmic values from MP, and should therefore be considered an original melody composed by Hines.” This is not accurate. *Only one pitch in the 11-note FLAME melody – the third “C” note – is different from MP.* With respect to rhythm, the differences are (1) the ascending notes occur at twice the rate as they do in MP, and (2) the sustained “E-flat” pitch starts a half beat later and is a half beat shorter in duration. The last 5 consecutive notes are identical to MP in both rhythm and pitch. Notably, Bennett fails to provide any transcription of MP and wholly ignores all of the prior public domain works that use that stock device just as the 5 Second Intro does.

111. Thus, despite the fact that the FLAME Intro melody uses all 10 pitches of MP in the same chronological order, and that the last 5 of these pitches are also identical in rhythm, the Bennett report argues that this melody (the 5-second Intro) “should...be considered an original melody composed by Hines.” As analyzed above, it is not; the only additional note that Hines added to the MP 10 note stock phrase to come to 11 notes is a single C pitch, which does not even appear in PAPER or TOE.

112. Moreover, the Bennett Report's contention is wholly at odds with the Bennett Report's other assertion that the guitar melodies in PAPER and TOE, which are much more different from FLAME than any differences between FLAME and MP, should not be considered original. The Bennett Report does not address all of those differences. As shown above, the differences between the melodies in PAPER and TOE and FLAME are far more extensive than any differences between FLAME and MP.

113. In short, the Bennett Report applies a double standard for what qualifies as an "original melody". When comparing the 5-second Intro in FLAME and MP, Bennett gives tremendous weight to small differences, without even identifying them, concluding that the melody in the 5-second Intro in FLAME is "original" and not copied. But when comparing PAPER and TOE to FLAME, the many significant differences in pitch and rhythm are downplayed or ignored, leading to the Bennett Report's conclusion that the melodies in PAPER and TOE are "compositionally copied" from FLAME.

114. At page 8 and in the summaries at pages 2 and 9, the Bennett Report assigns numerical percentages to the amount of material in PAPER and TOE that is allegedly derived from the 5-second Intro in FLAME. As explained at page 8 of the Bennett Report, these percentages represent the total time during which guitar is present over the total runtime of each song, which is calculated as 84% in PAPER and 100% in TOE. These percentages are uninformative at best and misleading at worst. Not factored into the Bennett Report's calculus is the presence of numerous other compositional elements that are not at issue vis-à-vis FLAME, including vocal melodies, chord progressions, drum/percussion rhythms, non-guitar instrumental parts, and lyrics. As such, the 84% and 100% figures are largely meaningless and unhelpful to any assessment of the nature or value of the expression at issue in PAPER or TOE. Again, outside of playing a single pitch (on scale degree 6) off the beat, which is insignificant, the only expression in common between PAPER and TOE and the compositional elements in the 5-second Intro is public domain material that is not original to HINES. Contrary to The Bennett Report's contention, playing the 5-second Intro on an instrument would not identify it with FLAME but rather with MP.

## **V. CONCLUSIONS**

115. On the basis of my analysis of the constituent elements in PAPER, TOE, and FLAME individually, in the aggregate, and within the context of prior art, I found that there are no significant structural, harmonic, rhythmic, melodic, or lyrical similarities between PAPER and FLAME or between TOE and FLAME, and no musicological evidence suggesting that any expression in PAPER or FLAME was copied from TOE. Any similarities are thin and fragmentary and reconfigured to form new melodic expression in PAPER and TOE as compared with FLAME. The 5-second Intro at issue in FLAME appears only once briefly in the Intro of FLAME, has no connection to any melodies found elsewhere in FLAME, and is a minimal part of FLAME. In addition to being quantitatively insignificant, the 5-second Intro is qualitatively insignificant to FLAME as a whole. Moreover, the melody at issue in FLAME is unoriginal and is based on the “Mysterioso Pizzicato” cliché melody which is in the public domain and used in many musical compositions in multiple genres (including in film music and popular songs) that predate 1970. As such, the use of this melody in FLAME is merely an instance of the use of a stock device.

116. The analysis presented in the Bennett Report fails to show that the similarities between FLAME and PAPER and/or TOE represent copying of original expression. The Bennett Report asserts that, while the melody at issue in FLAME is derived from “Mysterioso Pizzicato”, it should be considered an “original composition”, yet simultaneously argues that both PAPER and TOE are “compositionally copied” from FLAME, even though the similarities between FLAME and MP are demonstrably greater than any similarity between PAPER and FLAME or between TOE and FLAME. Furthermore, the analysis of PAPER and TOE is based on a flawed transcription of TOE.

117. On that basis, it is my professional opinion that any similarities between PAPER and FLAME or between TOE and FLAME are commonplace and unremarkable, and they do not suggest copying of original expression from FLAME.

Respectfully submitted,

September 29, 2022

By: Lawrence Ferrara, Ph.D.

A handwritten signature in black ink, appearing to be 'Lawrence Ferrara', written over a horizontal line.

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For: Lawrence Ferrara, Inc.

**APPENDIX 1**

**LAWRENCE FERRARA, Ph.D.  
PROFESSOR OF MUSIC  
DIRECTOR EMERITUS  
MUSIC AND PERFORMING ARTS PROFESSIONS  
THE STEINHARDT SCHOOL  
NEW YORK UNIVERSITY**

**Educational Background**

B.A.	Music	Montclair State University
M.M.	Music	Manhattan School of Music
Ph.D.	Music	New York University

**Teaching Background**

1979-84	Assistant Professor of Music	New York University
1984-92	Associate Professor of Music, Tenured	New York University
'92-present	(Full) Professor of Music	New York University
1995-2006	Professor of Music and Department Chair	New York University
2006-2011	Professor of Music and Director, Music & Perf Arts	New York University
2011 (Sept.)-present	Professor of Music and Director Emeritus	New York University

**Selected Professional Activities**

Cambridge,

Mass: 2022, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law, via Zoom

Los Angeles: 2022, invited CLE lecture on music copyright for members of the Los Angeles Copyright Society via Zoom

Los Angeles: 2021, invited CLE lecture on music copyright for lawyers at Netflix via Zoom

Cambridge,

Mass: 2021, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law, via Zoom

New York: 2021, participation on a panel regarding curricular development in musicology, American Musicological Society GNY, via Zoom

New York: 2020, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright, delivered via Zoom

Cambridge,

Mass: 2020, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

New York: 2019, American Musicological Society GNY, peer-reviewed Keynote presentation regarding Music Copyright and Musicology, at New York University

Cambridge,

Mass: 2019, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

New York: 2019, Download Digital Tech Conference hosted by Davis Wright Tremaine, invited participation on a panel regarding music copyright

New York: 2018, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright

Cambridge,  
Mass: 2018, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

New York: 2018, American Musicological Society GNY, invited participation on a panel hosted at Columbia University regarding Leadership and the Future of Musicology

New York: 2017, American Musicological Society GNY, peer-reviewed Keynote presentation regarding Philosophy and Musicology, at New York University (April)

New York: 2017, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright

Cambridge,  
Mass: 2017, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

New York: 2017, American Musicological Society GNY, invited presentation and participation on a panel hosted at Columbia University regarding Leadership in Musicology (January)

Los Angeles,  
California 2017, Southwestern Law School Annual Media Law Conference, invited panel member regarding music copyright

New York: 2016, Loeb & Loeb, Annual IP/Entertainment Law CLE Conference, invited panel member regarding music copyright

New York: 2016, The Copyright Society of America (NY), invited panel member regarding music copyright

New York: 2016, American Musicological Society GNY, peer-reviewed presentation regarding Corpus Analysis in musicology

Cambridge,  
Mass: 2016, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

- New York: 2016, invited lecture on music copyright at Fordham University Law School, class on Advanced Copyright
- Cambridge,  
Mass: 2015, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law
- New York: 2015, American Musicological Society GNY, invited presentation and participation on a panel hosted by The Juilliard School at Lincoln Center regarding Changes in Music Delivery and Reception in the 21<sup>st</sup> Century
- Cambridge,  
Mass: 2014, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law
- New York: 2014, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright
- New York: 2014, American Musicological Society GNY, peer-reviewed presentation on musicological issues regarding the composition embodied in a sampled portion of a sound recording in music copyright claims
- New York: 2014, International Double Reed Society Conference, invited presentation on the musicological elements and implications in *Newton v. Diamond*
- Cambridge,  
Mass: 2013, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law
- New York: 2013, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright
- New York: 2013, American Musicological Society GNY, peer-reviewed presentation including an analysis of the musical composition in “The Phantom Song” from *Phantom of the Opera* by Andrew Lloyd Webber related to *Repp v Webber*
- New York: 2012, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright



Cambridge,  
Mass: 2012, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

Sweden: 2011, interviewed (in New York) and featured in the Swedish TV series, "The Story Behind the Hit Song," regarding music copyright

Cambridge,  
Mass: 2011, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

New York: 2010, invited presentation and moderator of a panel on sound recording sampling and music copyright for The Copyright Society of the United States, New York Chapter

New York: 2010, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright

Montclair,  
NJ: 2010, invited to give the Inaugural Jack Sacher Memorial Research Lecture (on music analysis in music copyright matters) for the opening of the John Cali School of Music at Montclair State University

New York: 2010, invited lecture on music copyright followed by a dialogue with Academy Award winner, F. Murray Abraham, for The Pathfinders Series at The First Presbyterian Church of New York City

New York: 2008, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright

Ireland: 2007, interviewed on Irish radio regarding music copyright

New York: 2007, Invited opening and closing lectures for a Conference co-sponsored by The New York Philharmonic and the Finnish Consulate on Music regarding Music Learning and Performance in Finland

New York: 2006, invited panelist at the CMJ Conference at Lincoln Center regarding music copyright

New York: 2006, invited panelist at the Remix Conference regarding music copyright

- New York: 2006, invited presentation for the New York Institute for the Humanities regarding music analysis and music copyright
- New York: 2006, invited Keynote Address for The Mastery of Music Teaching Conference sponsored by The Metropolitan Opera Guild and The New York Philharmonic
- Washington  
D.C.: 2005, invited panelist/presenter at the Future of Music Policy Summit regarding music copyright and *Newton v Diamond*
- New York: 2005, invited panel and group discussion leader at the United Nations regarding rhythm in the music of multiple cultures as part of the U.N.'s World Summit on the "Information Society" and the United Nations Information and Communications Technology Task Force
- Cambridge,  
Mass.: 2005, invited panelist/presenter at Harvard University Law School's Berkman Center in a national conference regarding technology and intellectual property
- New York: 2005, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright
- Los  
Angeles: 2005, invited lecture regarding music analysis and music copyright in Los Angeles for an NYU Alumni event
- Orlando: 2005, invited lecture regarding music copyright and music analysis in Orlando, Florida for an NYU Alumni event
- Hawaii: 2004, invited workshop presentation and session chair regarding methodology for the analysis of a J. S. Bach organ prelude for the International Conference on Arts and the Humanities
- Norway: 2003, invited series of lectures on music theory and analysis co-sponsored by the Music Theory and Composition Departments of the Norwegian Music Academy, and the Department of Philosophy at the University of Oslo

New York: 2001, invited presentation and Chair of a panel at The United Nations regarding “Music within a Global Context.”

Italy: Summer 1993 & Summer 1994, Visiting Professor at University of Pisa teaching music analysis, performance practices, and philosophy of music

As a pianist, performed solo recitals and as an accompanist in the United States and Europe including on radio and television, recordings released by Orion Master Recordings and Musique international, and performed for musical theatre shows, accompanist to internationally acclaimed singers, and as a session pianist in pop styles.

At New York University’s Steinhardt School: Director of Music Performance Programs from 1980-1985, Director of Ph.D. Programs from 1986-1995, Chair of the Department from 1995 – 2011, and Director of all Music and Performing Arts studies (undergraduate through Ph.D.) in The Steinhardt School at New York University from 2006-2011.

Named “Director Emeritus” of Steinhardt Music and Performing Arts in 2011. Currently on the full-time faculty in music theory and music history.

Currently a member of the Editorial Board of the journal *Music and Moving Image* (University of Illinois Press) and on the board of Editorial Consultants for the journal *Philosophy of Music Education Review* (Indiana University Press).

### **Awards**

1972	Stoekel Fellowship, Yale University Graduate School of Music
1985	Presidential Research Fellowship, NYU
1988	Co-PI, Federal Grant for Research
1989	Co-PI, Federal Grant for Research renewed
1996	Daniel E. Griffiths Award for publication regarding the analysis of Arthur Schopenhauer’s works on music (Cambridge University Press, 1996).

### **Membership in Professional Organizations**

American Musicological Society

Society for Music Theory

### **Publications: Books**

Ferrara, Lawrence                      *Philosophy and the Analysis of Music: Bridges to Musical Sound, Form and Reference* (Greenwood Press) 1991

Ferrara, Lawrence and  
Kathryn E. Ferrara                      *Keyboard Harmony and Improvisation* (Excelsior Music Publishers) 1986

Phelps, Roger, Lawrence  
Ferrara and Thomas  
Goolsby                                      *A Guide to Research in Music Education*, Fourth Edition.  
(Scarecrow Press/The Rowman & Littlefield Publishing Group) 1993

Phelps, Roger, Lawrence  
Ferrara, *et al*                                      *A Guide to Research in Music Education*, Fifth Edition  
(Scarecrow Press/The Rowman & Littlefield Publishing Group) 2005

### **Courses Taught at NYU**

Aesthetic Foundations of the Arts:                      for Ph.D. students

Aesthetic Inquiry:    for Ph.D. students

Arts Heritage and Criticism:                                      for M.M. students

Classic Era Music, Analysis:                                      for M.M. students

Contemporary Music, Analysis:                                      for M.M. and Ph.D. students

Dissertation Proposal Seminar:                                      for Ph.D. students

Keyboard Harmony and Improvisation:                                      for B.M. students

Music Copyright, Landmark Cases:                                      for B.M. students

Music Criticism:	for M.M. students
Music History III, 19 <sup>th</sup> Century:	for B.M. students
Music History IV, 20 <sup>th</sup> & 21 <sup>st</sup> Century:	for B.M. students
Music Performance Practices:	for M.M. students
Music Reference & Research Methods:	for M.M. and Ph.D. students
Music Theory and Analysis:	for B.M. students
Seminar in Music Theory & Analysis:	for M.M. and Ph.D. students

### **Music Copyright**

A music expert in music copyright issues for more than twenty-five years providing opinions for plaintiffs and defendants

An active music copyright consultant for record, music publishing, and motion picture companies, and for individuals in the United States and abroad

A regularly invited guest lecturer in music copyright in classes at Columbia University Law School and Harvard University Law School

A conference panelist sponsored by Harvard Law School in 2005, a panel moderator in 2010 and a panel member in 2016 for The Copyright Society of the United States (NY), and a presenter for conferences and meetings regarding music copyright for CLE credits at Loeb and Loeb (NY) in 2016, Southwestern Law School (LA) in 2017, Davis Wright Tremaine (NY) in 2019, Netflix in 2021, and the Los Angeles Copyright Society in 2022.

Peer-reviewed presentations regarding music copyright for the American Musicological Society (GNY) in 2013, 2014, 2016, and 2019.

**Deposition and/or Trial Testimony in the last ten years**

- (1) Batts et al. v. Adams et al. in 2011
- (2) Francescatti v. Germanotta et al. in 2013
- (3) Marino v. Usher et al. in 2013
- (4) Roberts et al. v. Gordy et al. in 2014
- (5) Roberts et al. v. Gordy et al. in 2015
- (6) Fahmy v. Shawn Carter et al. in 2015
- (7) Copeland v. Bieber et al. in 2016
- (8) Skidmore v. Led Zeppelin et al. in 2016
- (9) Gray, et al. v. Perry, et al. in 2018
- (10) Gray, et al. v. Perry, et al. in 2019
- (11) Hall et al. v. Swift, et al. in 2021
- (12) Ambrosetti v. OCP & Farrell, et al. in 2022
- (13) Brunson v. Capitol CMG, Inc., et al. in 2022

**Fee rates for Professional Services**

\$495 per hour plus travel-related time and expenses

# **VISUAL EXHIBIT A**

**"Mysterioso Pizzicato" ("MP") Prior Art**

1. **"Family Skeleton Blues", Kitty Brown (1923):** The song begins with the clarinet playing a variation of the "MP" melody, including flutter tonguing on scale degree 6, as part of an instrumental Introduction preceding the vocal melody entrance.

<https://youtu.be/JploMk5Gn-E>

At 0:00



2. **"Mysterious Mose", Ted Weems and His Orchestra (1926):** At 0:10, several instruments play the full "MP" melody with a repeat and without a trill on scale degree 6 as part of an instrumental Introduction preceding the vocal melody entrance. The full melody occurs again at 1:54 and is quoted again at 2:52.

<https://youtu.be/4zGbQA4gveQ>

At: 0:10



The "MP" melody is also quoted in the Chorus in double time (e.g., 0:48) as transcribed immediately below.





3. **Carl Stalling, Disney Silly Symphonies "The Skeleton Dance" (1929):** At 1:50 in the cartoon, several instruments play a varied and chopped version of the "MP" melody.

<https://youtu.be/vOGhAV-84il>

At 1:50



4. **Van Beuren Studios, "Making" 'Em Move" (1931):** At 0:48 in this cartoon, the "MP" melody is played on several instruments but without the final four descending notes. (There is no trill on scale degree 6, but the trumpet plays the note with flutter tonguing.) At 4:43, the same shortened "MP" melody is played on a sax with flutter tonguing on scale degree 6.

<https://youtu.be/xplqueeOz0l>

At 0:48



At 4:43



5. **"The Skeleton in the Closet", Louis Armstrong (1936):** At 0:09, the bass clarinet plays the full "MP" melody with a trill on scale degree 6.

<https://youtu.be/JrSCjYhS-U>

At 0:09



6. **"Old Man Mose", Betty Hutton (1939):** At 0:02, the full "MP" melody with a repeat at 0:07 is split between tenor sax and trumpet but in different octaves as part of an instrumental Introduction preceding the vocal melody entrance. The bass plays the melody consistently within the same octave, as shown below. The melody returns at 1:31.

<https://youtu.be/EbgXxjxFpU>

At 0:02



7. **Max Steiner, "Frogs" from *The Adventures of Mark Twain*, (1944):** The film score includes a variation of the "MP" melody played on pizzicato strings at 0:30 with an ascending (not descending) melody at the end of the iteration. There is a less varied "MP" melody also played on pizzicato strings at 1:10. Instruments other than the pizzicato strings play a trill on scale degree 6.

[https://youtu.be/yF2Rv\\_4xIZk](https://youtu.be/yF2Rv_4xIZk) (2004 recording by Moscow Symphony and Chorus)

At 0:30



At 1:10



8. **"Ghost of Old Man Mose", Harry Gold (1949):** At 0:40, the trumpet plays the full "MP" preceded by a pickup note, with a trill on scale degree 6, and with a partial repeat. The "MP" melody returns at 1:19 and 1:58.

[https://youtu.be/uie0RQW\\_4dU](https://youtu.be/uie0RQW_4dU)

At 0:40



9. **"The Ghost Song", Salty Holmes (1954):** At 0:07, the organ plays the full "MP" melody with two repeats as part of an instrumental Introduction preceding the vocal melody entrance.

<https://youtu.be/nByFPMVrUB0>

At 0:07



10. **"At The House of Frankenstein", Big Bee Kornegay (1958):** The song begins with the saxophone playing the full "MP" melody with a trill on scale degree 6 and a repeat as an instrumental Introduction (along with spoken words) preceding the vocal melody. The "MP" melody returns at 0:40.

<https://youtu.be/QwiOXrwouAs>

At 0:01



The altered descending scale "chops" and recombines the "MP" melody by inserting the additional scale degrees 5-4 on beat 2 of bars 2 and 4.

[illegible]

<https://youtu.be/OTXrTtu1jy4>

13. **"Peek-A-Boo", The Cadillacs (1958):** The opening of the song features the "MP" melody played on saxophone as an instrumental Introduction immediately preceding the vocal melody.

<https://youtu.be/bFWRDaVhGw>

At 0:00



An iteration at 0:57 replaces the final note of the "MP" melody (on the downbeat) with a guitar playing a tremolo-like double-stopped, sixteenth-note riff on a i/I chord.

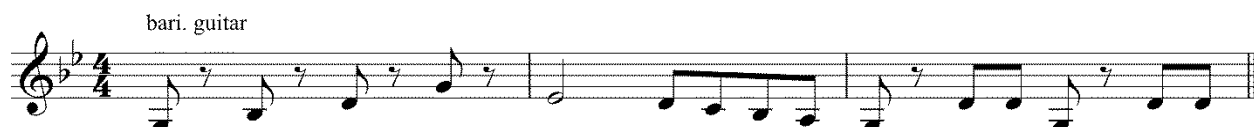
At 0:57



**14. "The Mummy's Bracelet", Deane Hawley and the Crystals (1959):** At 0:02 (as part of an instrumental Introduction preceding the vocal melody) and again at 0:32, the baritone guitar (or "tic-tac bass") plays the full "MP" melody without a trill. An upright bass doubles the melody but with four eighth notes instead of a half note on scale degree 6. The "MP" melody is reiterated after every Verse.

<https://youtu.be/cqOF4G9O3VE>

At 0:02





**17. Hans Conreid and Alice Pearce, "Monster Rally" (1959):** At 1:29 the trombone plays the "MP" melody, minus the last pitch, with a "slide vibrato" on scale degree 6. Simultaneously, the bass (also at 1:29) plays the "MP" melody including the final pitch, but with scale degree 6 placed one octave lower.

<https://youtu.be/SE4puzQXOHc>

At 1:29



At 1:29



**18. Hans Conreid and Alice Pearce, "Not Of This Earth" (1959):** At the opening, the piano plays the "MP" melody minus the final pitch with a tremolo chord under scale degree 6 as part of an instrumental Introduction that precedes the vocal melody.

[https://youtu.be/08ADTSHv\\_Jo](https://youtu.be/08ADTSHv_Jo)

At 0:00





**19. Victor Herbert (1903 original composition); “We Won’t Be Happy ‘Till We Get It” from the Disney film *Babes in Toyland*, (1961):** This version of the Victor Herbert song from the 1961 Disney film begins with the low brass playing a variation of the "MP" melody as an instrumental Introduction preceding the vocal melody. The MP variation repeats at 0:39.

<https://youtu.be/VFP7OgB8-C0>

At 0:01



**20. "The Bogey Man", The Moontrekkers (1963):** The song begins with the synthesizer playing the full "MP" melody four times consecutively. The full "MP" melody returns in the Outro at 1:55.

<https://youtu.be/tQdD81A8t4E>

At 0:02



**22. "Count Macabre", The Connoisseurs (1964\*):** The song begins with the saxophone playing the full "MP" melody, including the repeat and no trill on scale degree 6 as part of an instrumental Introduction preceding the vocal melody.

\*According to Discogs, "Count Macabre" was released on the Music Productions (M-P) label (in Baton Rouge) but was pressed by Houston Records as catalog number LH 1213. That catalog number places it in 1964.

**23. "Whodunit", Willard Chamberlain (1960s\*):** The song begins with the full "MP" melody, including a vibrato on scale degree 6 and a repeat. At 0:19, the "MP" the melody returns with a blues chord progression and largely continues throughout track. In subsequent iterations (during the blues progression), the sax uses flutter tonguing on scale degree 6. <https://youtu.be/RvupxIMwC08>

At 0:01

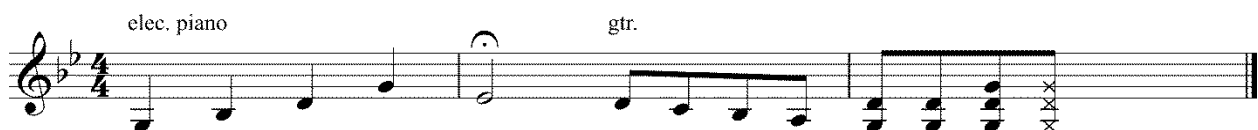


\*According to a blog called The Musicians' Olympus

(<http://musiciansolympus.blogspot.com/2014/07/johnnywinter-guitar.html>), Willard Chamberlain played saxophone in Johnny Winter's band, along with Johnny's brother Edgar, from approximately 1959 to 1965. They were based in Beaumont, TX. Since "E. Winter" (probably Edgar) is listed as a co-writer on the B-side of "Whodunit", it's likely that Chamberlain made this record with members of Johnny Winter's band around that time.

**24. "Strychnine", The Sonics (1965):** The song begins with the full "MP" melody, the first five notes played on an electric piano and the remaining notes played on guitar in a faster tempo and continuing into guitar power chords, starting with i5 on the last downbeat as part of an instrumental Introduction preceding the vocal melody. <https://youtu.be/f7Nffq0bOgE>

At 0:02



**25. "Scrooge", The Venture's (1965):** At 0:18, the guitar plays the full "MP" melody with a repeat. The final note (scale degree 1) in the second iteration is played an octave higher.

<https://youtu.be/yAFfNiYy04U>

At 0:18

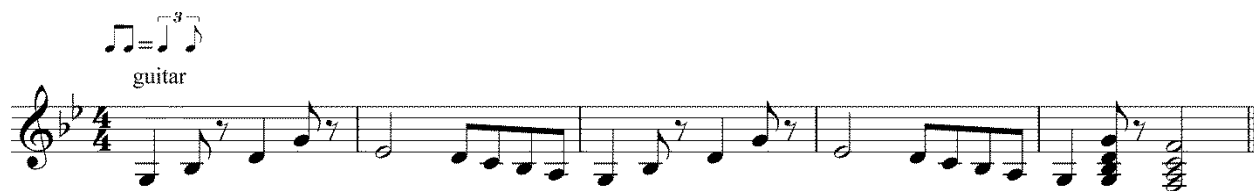


\*\*\*The rhythm guitar accompanies the ascending quarter notes with i chords.

**26. "Spider Walk", The Sabres (1965):** The song begins with the guitar playing the full "MP" melody, including the repeat and no trill on scale degree 6 as part of an instrumental Introduction preceding the vocal melody. The repeated "MP" melody is followed by a staccato i chord played on the guitar, which immediately continues into a descending (flamenco) chord progression. This "MP" melody is reiterated at 0:46 and 2:12.

<https://youtu.be/N4KnZ5OBN8g>

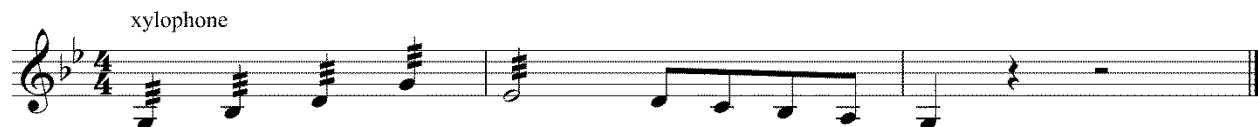
At 0:01



27. **"The Coming Home Party", Tiny Tim (1968):** At 0:09, there is an iteration of the "MP" melody with tremolos on the first five notes.

[https://youtu.be/Q-NOU\\_-bXb8](https://youtu.be/Q-NOU_-bXb8)

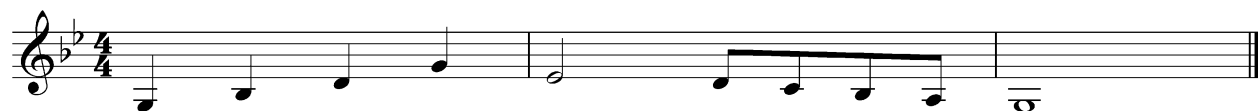
At 0:09



28. **"One, Two, Three", from The Groovie Ghoulies television show (1970\*):** At 0:03, the full "MP" melody is played on several instruments as part of an instrumental Introduction with spoken words and effects but before the entrance of the vocal melody.

<https://youtu.be/UjykWj26yxA>

At 0:03



\*This was released on the *Groovie Goolies* album in 1970. It appears to be the same recording that was used in the TV show. The following link is for the album version.

<https://youtu.be/ib2QSxC8-A0>

**29. "Goin' Downtown", The Five Keys (1951/1971\*):** The song begins with the "MP" melody minus the first note, with a tremolo on scale degree 6, and a flatted scale degree 2 in the descending scale. It ends with the four-note ascending arpeggio figure.

<https://youtu.be/Euu1-ZMRYPI>

At 0:00



\*According to this source in the following link, this song was recorded for 78rpm format in 1951 but not released in that format: <https://www.45worlds.com/78rpm/record/3119>. The same recording was eventually released as a 45rpm single in 1971.

**30. "The Boogie Man", The Jackson 5 (1973):** At the opening, the "MP" melody is played on the guitar and bass without a trill on scale degree 6 but with the guitar playing a tremolo on the last note.

<https://youtu.be/R3SXCtjs0cc>

At 0:00



**31. "Monster Reggae", Frank 'N' Stein (1974):** At 0:07, the "MP" melody is played on bass and piano, followed by the piano playing chords in an off-beat reggae pattern. The guitar plays a "reggae-fied" version of the "MP" melody, including a brief chord after the last note. The Verse bass line is a two-bar loop of the "MP" melody.

<https://youtu.be/iDQ70CF4-xc>

At 0:07

The musical score for 'Monster Reggae' at 0:07 is written in 4/4 time with a key signature of two flats (B-flat and E-flat). It features three staves: piano, guitar, and bass. The piano part (top staff) begins with a melody of quarter notes (F4, G4, A4, B4) followed by a series of chords (F4-A4, G4-B4, A4-C5, B4-A4) in an off-beat reggae pattern. The guitar part (middle staff) plays a 'reggae-fied' version of the 'MP' melody, consisting of eighth notes (F4, G4, A4, B4) followed by a brief chord (F4-A4) after the last note. The bass part (bottom staff) plays a two-bar loop of the 'MP' melody, consisting of quarter notes (F4, G4, A4, B4).

**32. "Teach Me How To Rock and Roll", The Creepies (1975):** At 0:11, the full "MP" melody is played on the guitar.

[https://youtu.be/dpsNiW\\_Zc8A](https://youtu.be/dpsNiW_Zc8A)

At 0:11

The musical score for 'Teach Me How To Rock and Roll' at 0:11 is written in 4/4 time with a key signature of two flats (B-flat and E-flat). It features a single staff for guitar. The guitar part plays the full 'MP' melody, consisting of quarter notes (F4, G4, A4, B4) followed by a series of chords (F4-A4, G4-B4, A4-C5, B4-A4) in an off-beat reggae pattern.

**33. “Leaping Lesbians”, Meg Christian (1977):** At the opening, the full "MP" melody is played on the guitar with scale degrees 6 and 5 played respectively over VI and V chords. The VI chord is played with a tremolo and the melody is repeated.

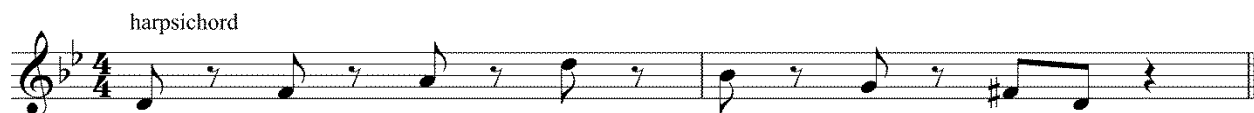
<https://youtu.be/yupK3mBzG38>

At 0:00



A varied "MP" melody, transposed up a perfect fifth to fit with the accompanying v chord, is played on harpsichord at 1:00 and 2:00.

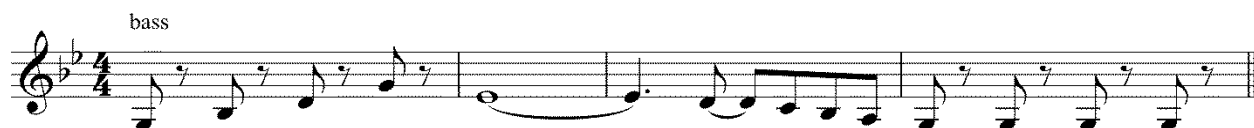
At 1:00



**34. “This Is Radio Clash”, The Clash (1981):** At the opening, the bass plays the full "MP" melody but with a longer scale degree 6 followed by a syncopated scale degree 5, and the guitar simultaneously plays the first four notes followed by sustained VI chord.

<https://youtu.be/krl-2hgFrJU>

At 0:00

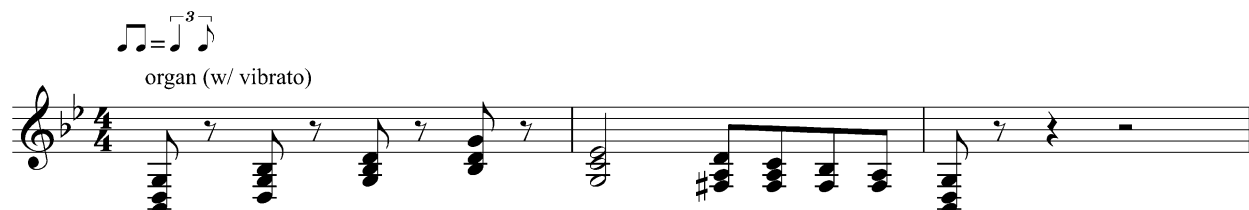




**35. “Goblin Girl”, Frank Zappa (1981):** At 0:17, the organ (with a vibrato effect) plays the full “MP” melody with chords under each note.

<https://youtu.be/2NwPJo4ysXI>

At 0:17



**36. Frank Zappa, "Zomby Woof", Live performance (1982):** this live performance incorporates the full "MP" melody at 4:34 with a repeat.

<https://youtu.be/m-HXtmQM4E0>

At 4:34



37. **“*Ghost Manor Main Titles*”, Xonox (game company) (1983):** The variation of the “MP” melody used as the theme song of this Atari video game has a major third in the ascending melody, possibly because of technical limitations.

<https://youtu.be/tVOJWNLKkel>

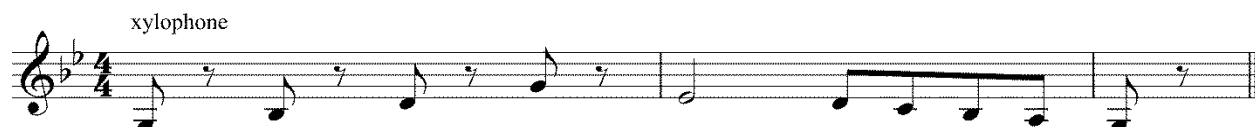
At 0:01



39. **“Comedy, Accent - Halloween Music, Percussion”, Sound Ideas (1992):** The full “MP” melody appears on this sound effects CD.

<https://youtu.be/19628hq9DGw>

At 0:00



40. **“Devil House”, Shonen Knife (1992):** At 0:14, the guitar plays the full “MP” melody with a partial repeat.

[https://youtu.be/7\\_AR-VqQif8](https://youtu.be/7_AR-VqQif8)

At 0:14



- 41. “Jack the Ripper”, The Fuzztones (1992):** A quote of the “MP” melody (with repeat) is played on guitar at 0:32 and segues into the theme from *Dragnet*.

<https://youtu.be/QdAHbDNOypo>

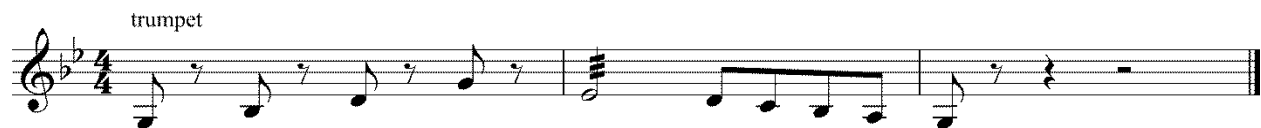
At 0:32



- 42. “Give Us a Mystery”, Mary-Kate & Ashley Olsen (1994):** The song begins with several instruments playing the full “MP” melody. The trumpet uses flutter tonguing on scale degree 6.

<https://youtu.be/lhhyu6TEPbY>

At 0:00



# **VISUAL EXHIBIT B**

HELP ME <sup>OUT</sup> Put the Flame (IN MY HEART) DEC 23 1969ERNIE HINES  
LUVALL WESBY  
EU 154302

I. When-ev-er you Kiss me, I Feel a burning desire  
 Yeah! Like you took a match, Girl- and  
 set my soul on Fi-re. You got me running-a-round in cir-  
 -cles, Got me so I don't even know my name. Somebody  
 Tell me what can I - do Uh, huh, to put out the Flame  
 in my heart. Help me put out the Flame.  
 (When-ev-er I'm)

II. Whenever I'm with you time has no meaning,  
 like the world standing still but left me here dreaming,  
 Baby, you got me in a whirlwind.  
 Sometimes I feel it's just a game.

Chorus

III. You know you got me under your spell.  
 I don't know why, I wish I could tell.  
 Don't even know day from night, yeah,  
 Don't even care if I'm wrong or right, yeah!

EAST/MEPHIS MUSIC CORP. AND COLORFUL MUSIC

DEC 23 1969

IV. Whenever you need me I go out of my mind.  
It's like being in a tin drum, Baby,  
You know you got me going out of my head.  
Sometimes I feel I'm insane.

Chorus